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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THURGOOD MARSHALL LEGAL SOCIETY AND BLACK PRE-LAW ASSOCIATION,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve a conflict among the Circuits as to the standard to determine whether a party may intervene as a matter of right under Rule 24(a), Fed. R. Civ. Proc., when the party on whose side the intervenor seeks to join is a governmental agency?

2. Were petitioner organizations of African-American students improperly prevented from protecting their members' constitutional and statutory rights to seek admission to the University of Texas Law School free of racial discrimination when the courts below refused to allow them to intervene in this lawsuit -- in which white plaintiffs seek to bar any consideration of race in the Law School's admissions process -- even though Petitioners sought to offer evidence and present defenses which the other parties to the case refused to advance, and which Petitioners contend establish the need for the Law School to take race into account in making admissions decisions in order to mitigate the continued effects of its own (and other Texas governmental entities') prior, intentional racial discrimination and in order to neutralize the racially discriminatory impact of other admissions criteria utilized by the Law School?

3. Did the courts below err in finding that a State whose higher educational system continues to be subject to the mandate of the federal executive agency enforcing Title VI of the 1964 Civil Rights Act (42 U.S.C. § 2000d) requiring that it dismantle the remaining vestiges of its prior dual structure, could and would adequately represent the interests of African-American students who were the intended victims of the discriminatory practices which pervaded and underlay that dual structure?

4. Did the court below so far depart from the accepted and usual course of judicial proceedings in applying the "law of the case" doctrine to issues that patently were not decided

in prior proceedings (and which the panel itself characterized as having been, at best, "implicitly decided") as to warrant correction by this Court in the exercise of its supervisory authority?

PARTIES TO THE PROCEEDING

The parties to the litigation are:

Petitioners (Proposed Intervenors):
Thurgood Marshall Legal Society
Black Pre-Law Association

Plaintiffs (Respondents):
Cheryl J. Hopwood
Douglas W. Carvell
Kenneth R. Elliot
David A. Rogers

Defendants (Respondents):

The State of Texas
The University of Texas Board of Regents
Bernard Rapoport, Ellen C. Temple, Lowell H. Leberman, Jr., Robert J. Cruikshank, Thomas O. Hicks, Zan W. Holmes, Jr., Tom Loeffler, Martha E. Smiley, and Mario Ramirez, members of the University of Texas Board of Regents
The University of Texas at Austin
Robert M. Behrdahl, President of the University of Texas at Austin
Mark Yudof, Dean of the University of Texas Law School
Stanley Johanson, Professor of Law at the University of Texas School of Law

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The opinion of the United States Court of Appeals for the Fifth Circuit was filed on March 18, 1996, is reported at 78 F.3rd 932 (5th Cir. 1996) and is reprinted in the Appendix at 1a-93a.

The May 1`, 1994 opinion of the United States Court of Appeals for the Fifth Circuit affirming the initial denial of intervention is reported at 21 F.3d 603 (5th Cir. 1994) (per curiam) and appears at 94a-100a. The August 19, 1994 opinion of the United States District Court for the Western District of Texas declaring unconstitutional the admission process used at the University of Texas Law School is reported at 861 F. Supp. 551 (W.D. Tex. 1994) and can be found in the appendix at 101a-187a. On January 24, 1994, the District Court denied the Petitioners' first motion for intervention the unpublished decision of the district court is contained in the appendix at 190a-195a. An unpublished order entered on July 15, 1994 by the District Court for the Western District of Texas denying Petitioners' second motion for intervention appears at 188a-189a. On March 18, 1992, Petitioners' suggestion for rehearing en banc was denied. This denial can be found at 196a-198a. The Fifth Circuit on April 23, 1996 issued two opinions of seven of the sixteen judges dissenting from the Court of Appeal's failure to grant rehearing en banc in this case and the consolidated case on the merits both of which appear at 196a-210a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals was filed on March 18, 1996. The Order denying the petition for rehearing was entered April 4, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution which provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall . . . deny any person within its jurisdiction the equal protection of the laws.

The case also involves Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which states:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The case also involves Fed. R.Civ. P. 24 (a), which states, in relevant part:

> Intervention of Right. Upon timely application anyone should be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

A. Proceedings Below

This suit was initiated by the filing of two complaints on September 29, 1992 and April 23, 1993 by two separate groups of white plaintiffs who had unsuccessfully applied for admission to the University of Texas Law School (hereinafter "the Law School") for the school year beginning in 1992. Plaintiffs claimed that the consideration of race by the Law School as part of a remedial policy of affirmative action in admissions violated the Fourteenth Amendment to the United States Constitution; 42 U.S.C. §§ 1981 and 1983;

and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq.

The district court bifurcated the procedural and merits issues and allowed the commencement of discovery related solely to issues of standing and ripeness. The State of Texas filed a motion for summary judgment on procedural grounds on August 13, 1993 which the District Court denied on October 28, 1993. On November 17, 1993, the Court authorized the beginning of merits discovery.

On January 5, 1994, less than two months after the beginning of discovery and nearly three months before its scheduled completion, Petitioners first moved to intervene in the case. Petitioners are two organizations of African-American students. The first, the Black Pre-Law Association (hereinafter "the BPLA") of the University of Texas at Austin, consists of undergraduate students interested in attending law school, including at the University of Texas. Each year, a number of BPLA's student members have applied for admission to the Law School.

The second organization, the Thurgood Marshall Legal Society ("TMLS") is an association of students at the Law School dedicated to advancing legal education for African-Americans and serving the legal and other needs of African-Americans.

Petitioners sought intervention as a matter of right under Fed. R. Civ. P. 24(a), as well as permissive intervention pursuant to Fed. R. Civ. P. 24(b). They alleged that the State could not adequately represent their interests because of 1) the long history of the State's discrimination against African-Americans; 2) the State's need to balance the defense of the affirmative action program against other interests such as fiscal responsibility, administrative concerns and public opinion (which would necessarily constrain the defense of affirmative action); and 3) the fact that the

Petitioners were in a better position to present evidence of recent discrimination. 97a.

In its order denying intervention as of right, 90a, the District Court, citing the Fed. R. Civ. P. and *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), relied upon a presumption that the State could be counted upon to adequately defend its own affirmative action program, and dismissed as speculative the Petitioners' concerns that the State would not fully represent their interest in the upcoming hearing.

The district court also denied permissive intervention on the ground that adding Petitioners to the case "would needlessly increase cost and delay disposition of the litigation." 194a.

On appeal, the Fifth Circuit upheld the denial of intervention as of right, articulating both the general presumption of adequate representation by existing parties cited by the District Court and a more stringent presumption applicable to cases involving state parties and governmental agencies:

> where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required . . . . In a suit involving a matter of sovereign interests, the State is presumed to represent the interests of its citizens.

97a-98a (citations omitted).

The Fifth Circuit ruled that these presumptions had not been overcome because Petitioners had demonstrated neither that the State would not strongly defend its affirmative action program nor that the Petitioners had a separate defense of the affirmative action plan that the State would not present at hearing. In reaching these conclusions, the Court relied explicitly upon its expectation that the State would present at the forthcoming trial

evidence that Petitioners felt was necessary to protect their interests:

> Although the BPLA and TMLS may have ready access to more evidence than the State, we see no reason they cannot provide this evidence to the State. The BPLA and the TMLS have been authorized to act as *amicus* and we see no indication that the State would not welcome their assistance.

98a.[1]

At the ensuing trial, the district court limited Petitioners' role to that of *amici curiae* and afforded them no opportunity to introduce evidence or argue before the court. Following the direction of the Fifth Circuit, Petitioners provided the State of Texas with evidence showing that the Texas Index, a statistical measure combining undergraduate grade-point average and LSAT scores used in sorting applicants to the Law School, could not reliably predict law school performance of first-year African-American students and offered the State the testimony of an expert qualified to present evidence that race-conscious admissions to the Law School were necessary to avoid the discrimination and potential Title VI liability that would result from reliance on the Texas Index exclusively.[2] The state declined to introduce the evidence or the testimony of the expert witness, presented no evidence concerning the validity of the Texas Index and

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[1]Noting that the Fifth Circuit had never reversed a lower court's decision on Rule 24(b) permissive intervention, the Court found that the district court had not abused its discretion in denying petitioners' motion to intervene. 99a-100a.

[2]One need not presume animus on the part of the state to understand why such evidence would be awkward for the state to introduce.

raised no argument that race-conscious measures were required to mitigate the discriminatory effect of its use.

At the conclusion of trial, Petitioners submitted a post-trial *amicus* brief supporting the constitutionality of the Law School's admission policy. In the brief, Petitioners again argued (relying upon the declaration of the expert witness proffered to the State) that rather than being an unjustified preference for African-American students, the challenged race-conscious admission process was legally required to ameliorate the discriminatory impact of the Texas Index.

Plaintiffs moved to strike portions of Petitioners' post-trial amicus brief including the declaration. Although the district court denied the motion to strike, it indicated that it would consider only the evidence introduced at trial by the parties.

On July 12, 1994, before the district court had announced its judgment on the merits, Petitioners moved again to intervene for the limited purpose of introducing evidence supporting the independent defenses that the State failed to raise. The district court denied that motion without opinion on July 15, 1994. 188a-189a.

On August 19, 1994, the district court entered judgment on the merits for plaintiffs, holding that while certain types of race-conscious admissions are constitutionally justified at the Law School, the 1992 admissions policy under which the plaintiffs were considered and rejected was not "narrowly tailored" and was therefore unlawful. The court awarded plaintiffs nominal damages but declined to order that they be admitted or to enjoin defendants from any consideration of race in the admissions process. Although the district court recognized that formerly dual systems of higher education are "under an affirmative duty to eliminate every vestige of racial segregation and discrimination" pursuant to *United States v.*

Fordice, 505 U.S. 717 (1992), 151a, the court did not consider or address the separate defenses advanced by the Petitioners or hold that affirmative action by the Law School is necessary to avoid unlawful discrimination, as urged by the Petitioners.

Petitioners appealed from this second denial of intervention and plaintiffs appealed the district court's judgment on the merits. Petitioners argued that the district court had failed to recognize the significance of the State of Texas's unwillingness to raise the defense of its admission programs which the petitioners had proffered in the course of trial. Petitioners contended that the court's failure to allow limited intervention at the conclusion of trial based upon the fact that the State's conduct of its defense showed unequivocally that Petitioners' and the State's interests and defenses were divergent was error. As a result, Petitioners alleged that they were denied the opportunity to contribute evidence and defenses that would have compelled the court to acknowledge the remedial basis for the Law School's admission program and therefor effectively protect their interest in assuring the continued presence of African-American students to the Law School.

A panel of the Fifth Circuit affirmed the post-trial denial of intervention without addressing Petitioners' claim that the State's failure at trial to present the evidence which would have compelled the use of race-conscious admissions at the Law School constituted undeniable proof that Petitioners' interests were not in fact adequately represented.

Instead, the panel upheld the district court based on the doctrine of "law of the case", finding that the panel hearing the appeal of the first denial of intervention had "implicitly" addressed the legal questions raised in the second intervention motion -- even though that motion was not made until after the completion of trial and after it had become clear that the first panel's expectation that the State

would advance arguments urged by the plaintiffs was not to be realized.

At the same time, the Fifth Circuit reversed the district court regarding the merits case, holding in sweeping terms that the law school may not use race as a factor in admissions and dismissing out of hand the use of race to achieve diversity in an academic setting as well as all arguments that the use of race-conscious admissions was necessary to address the present effects of past discrimination.

Petitioners then suggested rehearing *en banc* on the issue of denial of intervention.[3] On April 9, 1996, the Court denied rehearing *en banc* and announced the forthcoming release of a dissent from the denial. On April 23, 1996, the two dissenting opinions from the denial of rehearing in both of the consolidated cases were released. The first, written by Chief Judge Politz and joined by six additional judges, faulted the Court for denying rehearing of a panel decision which the dissenters felt "departed from the normal considerations of judicial restraint" by addressing issues that had not been properly raised in the case below and by effectively overruling this Court's decision in *Bakke*. Judge Stewart wrote separately to emphasize the historical irony of the Circuit's failure to grant rehearing and to condemn Petitioners' exclusion from the lawsuit through the denial of

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[3]The State did not seek rehearing. In their suggestion for rehearing, as they do now, while acknowledging their inability to seek rehearing in the merits case because they were not parties, having been denied intervention, Petitioners stated their belief that the issues decided in the consolidated merits appeal were of extraordinary public importance and had an impact on the interests of all African Americans, including those represented by Petitioners .Petitioners nonetheless stated their belief that rehearing would be warranted due to the importance of the issues raised as well as the apparent conflict between the panel's decision and the holding of this Court in *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978).

intervention: "[a]s to the request to intervene, what class of persons is more qualified to adduce the evidence of the present effect of past discrimination than current and prospective black law students?" 209a.

B. Statement of Facts

The significance of the Fifth Circuit's exclusion of African-American pre-law and law students from participation in a case that could result in the implementation of an admission process that effectively (and unjustifiably) excludes African-American and Mexican American students from attendance at the University of Texas Law School can only be understood within the context of historical and current discrimination affecting students and applicants to the Law School and the continuing obligation of the Law School to remedy prior discrimination. For that reason, the facts of the merits appeal are in some measure inextricable from issues raised by the Petitioners. Accordingly, Petitioners submit that this Court should grant certiorari on the question of denial of intervention as well as on the merits, see Petition No. 95-1773, and the facts relevant to both are discussed briefly below.[4]

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[4]Petitioners recognize that, as non-parties, they cannot themselves seek review of the merits ruling, but they urge this Court to grant the Petition filed by the State of Texas with this Court on April 30, 1996. The decision of the Fifth Circuit prohibiting the consideration of race in the admissions process at the University of Texas conflicts with relevant precedents of this Court including *Regents of the University of California v. Bakke* and for the reasons given by the State and the dissenters from the denial of rehearing *en banc*, warrant review by this Court:

> [t]he radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation. A case of such monumental import demands the attention of more than a divided panel.

200a.

As discussed below, Petitioners believe that fairness dictates not

There is no dispute that the State of Texas was responsible for creating and maintaining a system of higher education rife with discrimination:

> Texas' system of higher education has a history of state-sanctioned discrimination. Discrimination against blacks in the state system of higher education is well documented in history books, case law, and the State's legislative history.

106a.

From the mid-1800's until this Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), the Law School operated with official admissions policies and practices that expressly excluded persons of African descent. The Texas Constitution and state statutory provisions restricted the school to white students, Tex. Const. art. VII, §7 (1925, repealed 1969), and at the time Heman Sweatt applied for admission to the Law School in 1946, no law school in the state of Texas admitted African-Americans. 106a. The State's response to *Sweatt's* exposure of the complete absence of legal education for African-Americans was inadequate: "The State hastily created a makeshift law school that had no permanent staff, no library staff, no facilities, and was not accredited. 106a-107a, citing *Sweatt v. Painter*, 339 U.S. at 632.

This Court's unanimous decision requiring that the University of Texas admit Mr. Sweatt did not halt the flagrant discrimination to which he and other minority students were subjected. As the district court found, the end of explicit racial prohibitions did not root out deeply

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only a review of the merits appeal but also the inclusion of Petitioners both to assure that no decision of such import is made without a complete record and to assure participation in the process by those who had suffered most from prior discrimination and who stand to lose the most by an adverse ruling in the matter.

entrenched discrimination at the Law School: "Sweatt left the law school in 1951 without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings." 107a.

The district court found that the University of Texas continued discriminatory policies for decades after the *Sweatt* decision. In the 1950s and 60s, the Texas Board of Regents prohibited blacks from living in or even visiting white dormitories and assigned Mexican-American students to segregated housing. 107a. In the 1960s, Mexican-Americans and African-Americans were also excluded from membership in most University-sponsored organizations. *Id.*

Continuing discrimination was not limited to treatment accorded minorities upon their admission to the Law School. The record indicated that barriers to admission in the law school remained in place long after the *Sweatt* decision. Notwithstanding the minimal standards for admission that were in place until 1965, the number of African-American students admitted was extremely small. 112a.

Although the Law School tried to increase minority representation in the student body in the late 1960s through participation in the Council on Legal Education Opportunity (CLEO,) a program that provided summer training at participating law schools for minority graduates of various universities, the Law School's involvement was short-lived, as were any gains in minority participation. During the 1971-72 admission cycle, after the Law School ended its participation in the CLEO program, the Law School admitted no African-Americans . 114a.

The first serious effort to remedy segregation at the Law School came as a result of an action brought against the United States Department of Health, Education and Welfare ("HEW"), the predecessor to the United States Department of Education. In 1970, a class of African-American students

in 17 Southern and border states, including Texas, sued HEW asserting that the federal government's funding of state systems of higher education that discriminated against African-Americans by operating segregated institutions violated Title VI of the Civil Rights Act of 1964 and the U.S. Constitution. *Adams v. Richardson*, 351 F.Supp. 636 (D.D.C. 1972), 356 F.Supp. 92 (D.D.C.), *modified* and *aff'd unanimously en banc*, 480 F.2d 1159 (D.C. Cir. 1973), *dismissed sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). The district court ordered the federal government to enforce Title VI in higher education.

In 1980, the *Adams* plaintiffs sought further relief with respect to the higher education systems in Texas and other states. In 1981 the Office for Civil Rights of the United States Department of Education ("OCR") found that Texas had "failed to eliminate the vestiges of its former *de jure* racially dual system of public higher education, a system which segregated blacks and whites." 109a.

In 1982, the Assistant Secretary of Education informed the State defendants that existing plans, which included a commitment to the goal of equal educational opportunity and student body desegregation for both blacks and Hispanics, were insufficient to eliminate the vestiges of past discrimination. The plan's goals for the enrollment of African-American and Hispanic students fell short of the State's earlier commitment to seek enrollment of those groups in proportion to their representation among graduates of the State's undergraduate institutions. 104a-110a referring to Letter of Assistant Secretary of Education Clarence Thomas, D-284. The defendants responded with a revised plan, which OCR rejected, in part because it did not set targets for increasing minority enrollment for each institution. Id.

On March 23, 1983, the district court ordered OCR to commence formal enforcement proceedings against Texas

within 45 days, unless OCR concluded that Texas had submitted a desegregation plan in full conformity with governing law. 110a. After the 1983 *Adams* Order, Texas submitted an amended plan to OCR in which it committed itself to improved measures to meet enrollment goals for black and Hispanic students in its professional schools. Under this plan, defendants agreed "to consider each candidate's entire record and [to] admit black and Hispanic students who demonstrate potential for success but who do not necessarily meet all traditional admission requirements." 110a. The plan was subject to monitoring for compliance until 1988. 111a.

In 1987, OCR contacted state higher education authorities informing them that a final evaluation would have to be conducted prior to the expiration of the plan the following year in order to determine if the State met its obligations. 111a. Having itself determined that the goals and objectives of the plan had not been met, the State voluntarily developed a successor plan. *Id.* As of the time of the district court's ruling in this case, OCR had not completed its evaluation of Texas' compliance with Title VI. 112a. In January 1994, the Department of Education notified Governor Richards that OCR was continuing to oversee Texas' efforts to eliminate all vestiges of *de jure* segregation and that it would be reviewing the Texas system in light of *United States v. Fordice*, 505 U.S. 717 (1992).

In addition to its findings about the continuing vestiges of discrimination in the Law School, the district court made findings that placed the Law School within the context of education statewide.[5] As is true in the area of higher education, Texas has a long and lingering history of discrimination at the elementary and secondary school levels:

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[5]Since state law requires that enrollment at the Law School must consist of 85% Texas residents, the majority of law students attended Texas schools at earlier stages of their academic careers. 128a-129a.

"[t]he history of official discrimination in primary and secondary education in Texas is well documented in history books, case law and the record of this trial." 104a. *See also LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993, *cert. denied*, 114 S. Ct. 878 (1994)(recognizing that the long history of discrimination against African-Americans and Hispanics in all areas of public life is beyond dispute). Indeed, the State of Texas and virtually every major school system within it have been found by a court to have operated a racially dual system of education. *See e.g. Houston Independent School District v. Ross*, 282 F.2d 95, 96 (5th Cir. 1960); *Borders v. Rippy*, 247 F.2d 268 (5th Cir. 1957)(Dallas); *United States v. Texas Education Agency (Austin)*, 467 F.2d 848 (5th Cir. 1972); *Flax v. Potts*, 204 F.Supp. 458 (N.D. Tex. 1962), *aff'd*, 313 F.2d 284 (5th Cir. 1963) (Ft. Worth); *United States v. State of Texas*, 321 F. Supp. 1043, 330 F. Supp. 235 (E.D. Tex. 1970), *aff'd with modifications*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (statewide relief).

Many of these districts have not been determined to have eliminated (to the extent practicable) all vestiges of the dual systems under which they once operated. The trial court expressly found that, as of May 1994, "the problem of segregated schools is not a relic of the past" as reflected in the fact that desegregation lawsuits remained pending against more than forty Texas school districts. 105a.

The court also found that persistent racial hostility at the Law School had perpetuated the perception that the Law School was intended for white students. 153a.

After weighing the examples of persistent vestiges of discrimination including those cited above, the district court found that "[t]he defendants have shown it is not possible to achieve a diverse student body without an affirmative action program that seeks to admit and enroll minority candidates." 156a. Dramatic proof of the need for affirmative action could be seen in the effect that elimination of race-conscious

relief would have on the racial composition of the student body at the Law School. The court made an evidentiary finding that "[h]ad the law school based its 1992 admissions solely on the applicants' [Texas Index scores] without regard to race or ethnicity, the entering class would have included, at most, nine blacks and eighteen Mexican Americans." 150a.

In addition to the evidence of the present effects of past discrimination considered by the court, the Petitioners sought to intervene twice to present evidence which showed that admissions practices currently in use had a discriminatory impact on African-American students. Petitioners identified and made known to State defendants an expert witness who was qualified to present evidence that race-conscious admissions to the Law School were necessary to avoid the unlawful racial discrimination (in violation of Title VI) that would result from application of the same Texas Index requirements to white and African-American students. This evidence was never properly before any of the courts below because of the State's refusal to present this defense and the lower courts' refusal to allow Petitioners to intervene to present this and other defenses.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In holding that the University of Texas Law School may not consider race as a factor in making admissions decisions, the Fifth Circuit Court of Appeals disregarded this Court's decisions while excluding evidence that provided ample justification for the use of race-conscious criteria in admissions. The Court's errors of deciding issues not fully presented by the case before it, of failing to recognize the significance of continuing effects of the State's prior unconstitutional conduct, and of rejecting the holding in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that the goal of diversity in higher education is a sufficient justification for considering race as a factor when

making admissions decisions, were compounded by its affirmance of the district court's denial of intervention to the Thurgood Marshall Legal Society and the Black Pre-Law Association, organizations which represent African-American students who attend the University of Texas Law School and the University of Texas.

The Fifth Circuit's decision to exclude the Petitioners from this litigation should be reviewed by this Court not only because it impedes their ability effectively to protect their interest in preserving an admission program that counters, rather than perpetuates, the effects of discrimination of which they were historical victims but also because the effect of the denial of intervention was to preclude the introduction of evidence that would have amply justified the use of race-conscious measures -- evidence the State refused to present and which only the Petitioners were prepared and willing to proffer at trial.

Constitutional questions as far-reaching as those raised in this case should be decided carefully after rigorous examination of all of the potential defenses and with consideration of all of the varying interests involved. Such rigor was absent in the decision below. Decisions made on a perfunctory basis are undesirable in any case. In this case, the effects were particularly serious. The failure to permit the parties who have the most to lose from a prohibition against race-conscious admissions to enter the case and the court's unwillingness to consider competent evidence that affirmative action was not only justified but compelled by the existence of present discrimination against African-Americans is particularly grave given Texas' long history of denying equal educational opportunity to the class of which Petitioners are members.

African-Americans increasingly find themselves reduced to the status of observers of Federal Court proceedings that result in loss of hard-fought achievements of earlier cases brought by their predecessors. The loss of

those achievements is felt even more harshly when, as here, African-Americans denied the opportunity to intervene are compelled to watch while the defense of their interests is placed entirely in the hands of entities which have for generations fought to deny them equal rights and which even today decline to use the most effective weapons in the arsenal of available defenses. The very same law school which was the subject of this Court's landmark decision in *Sweatt v. Painter*, which first opened the doors to legal education for African-Americans seeking to attend in Texas, has failed to adequately represent the interests of African-American students. This Court should review the panel's decision and take corrective action.

I. Certiorari should be granted to resolve a conflict among the Circuits as to whether the standard for intervention as of right on the side of a governmental agency is more stringent than the standard established by *Trbovich v. United Mine Workers*.

The court of appeals noted that the standard for intervention as a matter of right under Rule 24(a), Fed. Rules of Civ. Proc., ordinarily imposes a minimal burden on the movant, citing this Court's decision in *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972), holding that the requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate." 97a. The court below denied intervention to petitioners, however, by applying a "much stronger showing of inadequacy" because the party in question is a government agency, on the ground that in "a suit involving a matter of sovereign interest, the State is presumed to represent the interests of all of its citizens." 97a-98a.

There is substantial conflict and confusion among the courts of appeals as to whether the minimal *Trbovich* standard, or the Fifth Circuit's "much stronger" standard governs where the party whose representation is claimed to

be inadequate is a governmental agency. This is an important and recurring issue in the lower federal courts, and the conflict among them should be resolved by this Court.

The Second and Third Circuits have applied substantially the same *parens patriae* presumption as the one applied by the Fifth Circuit here. *See Brody by and Through Sugzdinis v. Spang*, 957 F.2d 1108, 1122 (3rd Cir. 1992); *United States v. Hooker Chemicals & Plastics*, 749 F.2d 968, 987 (2nd Cir. 1984); *but cf.*, *United States v. New York*, 820 F.2d 554, 558 (2nd Cir. 1987)(*parens patriae* presumption applies only when state acts as the sovereign representative of all of its people, not applicable when state sued in its capacity as an employer under Title VII of the Civil Rights Act of 1964).

On the other hand, the Ninth and Tenth Circuits have applied the *Trbovich* standard consistently in cases where the party whose representation is claimed to be inadequate is a governmental agency. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983); *United States v. Stringfellow*, 783 F.2d 821, 827 (9th Cir. 1986), *opinion vacated and remanded on other grounds sub nom., Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *United States v. Oregon*, 839 F.2d 635, 637-38 (9th cir. 1988); *Sanguine, Ltd. v. United States Department of the Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984).

Still other Circuits have taken different positions in different cases. Thus, the Court of Appeals for the District of Columbia Circuit followed the *parens patriae* rule in *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C.Cir. 1979), but has permitted liberal intervention, holding that Rule 24 (a) is satisfied when it can be said that the applicant intervenor has an interest different from the governmental agency *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986); *accord*, *Mille Lacs Band of Indians v. Minnesota*, 989 F.2d 994, 1000-1002 (8th Cir.

1993)(announcing *parens patriae* rule, but following *Dimond* in liberally finding inadequacy of representation); *Meek v. Dade County*, 985 F.2d 1471, n.77-78 (11th Cir. 1993)(presumption of adequacy of representation dissipates upon any showing of divergence of interests). *See generally Conservation Law Foundation v. Mosbacher*, 966 F.2d 39, 41-43 (1st Cir. 1992)(noting the split among the other circuits while finding government representation inadequate in case at bar).

In short, it is clear that under the standard of the Ninth Circuit, for example, Petitioners would have been permitted to intervene, since the State of Texas would not and did not "make all the arguments the applicants would make." *United States v. Oregon*, 839 F.2d at 638. The same result would have obtained in the Tenth Circuit and, most probably, in the District of Columbia, Eighth, and Eleventh Circuits as well. As we will now discuss, the issues raised by this case, and the arguments and evidence that would have been made by the Petitioners had they been granted party status through intervention exemplify the ways in which erroneous decisions respecting intervention can affect a court's judgment on the merits and underscore the need for this Court to state the correct standard.

II. This Court should review the denial of intervention in this case which involves race conscious admissions in higher education and the continuing vitality of *Bakke* from which the panel improperly departed, and which should not be resolved without the evidence that Petitioners sought to present as Intervenors.

The Fifth Circuit's decision on the companion merits appeal was far ranging and broad in its scope:

> In summary, we hold that the University of Texas School of Law may not use race as a factor in

> deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.

76a-77a.

This single sentence not only sums up a holding purporting to relate to infirmities of the selection process used by the Law School in 1992 but also effectively articulates a fundamental departure from and narrowing of the permissible use of race in admissions in higher education. As recognized by the judges dissenting from the denial of *en banc* consideration,"[t]he radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation." 200a. That the panel saw fit to disregard and effectively to overrule this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) permitting the consideration of race for purposes of obtaining a diverse student body, is itself sufficiently problematic. That it did so in a case which did not require a large-scale re-examination of what constitutes a compelling interest justifying the consideration of race as a factor in admissions in higher education adds injury to the initial insult.

This judicial overreaching is particularly egregious because, in addition to the reasons cited in the dissents, had any of the lower courts granted Petitioners' intervention motions, an additional, narrower basis for deciding the issue of the constitutionality of race-conscious admissions would have been before the court.

Both the concurring opinion of the three-judge panel and the dissents from denial of rehearing *en banc*, faulted

the panel and the entire court for violating basic restrictions on judicial authority. As a preliminary matter, "[t]he Supreme Court has left no doubt that as a constitutionally inferior court [the Fifth Circuit is] to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it." 201a, *citing Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

In addition to the constraints imposed upon Courts of Appeals by decisions of the United States Supreme Court, judicial restraint counsels against deciding constitutional issues not necessary to the disposition of individual cases, a principal that the court below has recognized in other contexts but refused to apply in this case:

> [I]t is settled that courts have a "strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979). This responsibility to avoid unnecessary constitutional adjudication is a fundamental rule of judicial restraint. *Three Affiliated Tribes v. World Engineering*, 467 U.S. 138, 157 (1984). All this, of course, applies not only to the Supreme Court but to lower courts as well. *See Bowen v. United States*, 422 U.S. 916 (1975).

Walton v. Alexander, 20 F.3d 1350, 1356 (5th Cir. 1994).

The Fifth Circuit violated both the charge to follow Supreme Court precedent and the prohibition against deciding unnecessary constitutional issues by treating this Court's decision in *Bakke* as no longer binding and issuing a blanket prohibition against the consideration of race in admission to the Law School:

> Rather than following this universally recognized canon, adhering to our established rules, and

> applying Supreme Court precedent, the panel charted a path into terra incognita. Judicial self-restraint was the first casualty . . . . The teachings proscribing the consideration of constitutional issues unnecessary to the decision soon followed. With these two limitations adroitly set aside, the panel majority apparently considered itself positioned to overrule *Bakke*.

205a.

The exclusion of Petitioners, and of the arguments and evidence that they sought to introduce is particularly ironic given the fact that those arguments and evidence would have expressly addressed the panel's concern that there was insufficient showing of a factual basis for the Law School's belief that it had a remedial justification for its racial classifications. 43a, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-78 (1986).

Petitioners sought to intervene precisely for the purpose of providing such remedial justification. They initially suggested to defendants that the Texas Index measure is invalid as to African-Americans and that its use in the admissions process had a discriminatory effect on African-Americans. As soon as it became clear that the State would not use this defense, Petitioners sought to introduce it themselves through a declaration prepared by Dr. Martin Shapiro. In his declaration, Dr. Shapiro summed up the results of his examination of the evaluation of statistics about the Law School's entering classes of 1986, 1987 and 1988 that were in the trial record:

> Specifically, I have concluded (1) that regression analysis results obtained by the Law School Admission Services [Plaintiffs Exhibits 136 and 137] conclusively demonstrate that the selection criteria which the Law School has used to evaluate African-American applicants were invalid, (2) that the Texas

> Index should not have been used as an initial sorting criterion for African-American applicants, but (3) that the practice of reducing the numerical values of the Texas Index required of African-American applications had, at least some, ameliorative effect upon the invalid application of the Texas Index.

Shapiro Declaration at ¶7.

Shapiro further concluded that "[t]he best, most valid, [admissions] procedure would have been to eliminate the use of the Texas Index as an initial sorting criterion for the African-American applicants and to proceed directly to the more extensive evaluation and review of the applications." Shapiro Declaration at ¶35. Failing that, however, lowering the Texas Index values used to sort African-American applications -- the course actually taken by the Law School -- "at least partially ameliorated the invalid preclusive effect of the Texas Index" by disfavoring fewer blacks under a measure that was invalid for them as a group. *Id.* at ¶37.

In contrast, Dr. Shapiro found that "the *least* valid procedure would have been to sort initially all applicants by applying the same required Texas Index values to both White and African-American applicants" *id.* at ¶ 38 (emphasis added) -- the alternative sought by plaintiffs. The result of this process would be to eliminate unlawfully "almost all African-American applicants, generally, and to eliminate many or all of the most qualified African-American applicants." Shapiro Declaration at ¶ 18.

The use of invalid measures that have a discriminatory effect on African-Americans is unlawful. *See* 34 C.F.R § 100.3(b)(2)(1993) (U.S. Department of Education regulations implementing Title VI); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984)(use of non-validated IQ tests with discriminatory effect on black children to place students in classes for the educable mentally retarded violates Title VI); *Groves v. Alabama State Board of*

Education, 776 F. Supp. 1518 (M.D. Ala. 1991) (enjoining, under Title VI, state board of education from using minimum ACT score as requirement for admission to undergraduate teacher training program); *see also United States v. Fordice*, 505 U.S. at 718-719,(expressing serious doubts about the constitutionality of Mississippi's continued use of ACT cut-scores for admission to its white colleges).

Compliance with anti-discrimination law requires eliminating or diminishing reliance on invalid, discriminatory measures as to those groups that are disproportionately excluded. *See Kirkland v. New York Dept. of Correction Services*, 628 F.2d 796 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981) (Title VII decision affirming trial court's addition of 250 points to the raw scores of group adversely impacted by invalid examination); *Association Against Discrimination in Employment v. City of Bridgeport*, 594 F.2d 306 (2d Cir. 1979) *cert. denied* 455 U.S. 988 (1982)(Title VII decision suggesting lowering the cut-off score for minority test takers as suitable remedy for an invalid test with a discriminatory effect).

Evidence of the continuing discriminatory effect of the Texas Index complements the extensive record of OCR findings of persistent vestiges of discrimination and demonstrates the unequivocal existence of present effects of discrimination. In light of the totality of the evidence, the challenged admission process was not a racial preference but rather a necessary and lawful response to the invalidity of applying this measure to African-American and Mexican-American applicants.

The failure of any of the courts below to address this evidence at any level creates an inadequate foundation for the broad-reaching decision rendered by the Fifth Circuit. This Court should grant certiorari on both the merits petition and this petition to assure that in reaching its decisions on issues that will have a dramatic impact on both institutions of higher learning and African-Americans, the

Court has the benefit of the full presentation of relevant evidence which is obtained only through adequate representation of important interests and argument on behalf of all parties.

III. This Court should review the denial of Petitioners' motions for intervention because the bases upon which the court below affirmed the trial court's denials conflict with relevant decisions of this Court and depart from accepted standards of judicial conduct.

Despite the strong interest Petitioners have in the outcome of this matter, and the fact that they would have brought to the litigation relevant evidence rejected and disregarded by the party which the Court entrusted to defend and represent their interests, the courts below have repeatedly denied them intervention. This denial is inconsistent with the ruling of this Court and prevailing decisions in other circuits.

On no occasion has a court held in this case that Petitioners' bid for intervention as of right should fail because it was untimely, or because Petitioners lacked an interest relating to the subject of the ongoing litigation or did not face the prospect of suffering an impairment or impediment to their ability to represent their interests. Petitioners, African-Americans who are present and prospective students of the Law School, have an undeniable interest in assuring continued opportunities for non-discriminatory admission and retention. *See United States v. Fordice*, 505 U.S. 717, 723 (1992) (recognizing role of private plaintiffs in vindicating their interest in elimination of vestiges of discrimination in prior dual university system); *Knight v. Alabama*, 14 F.3d 1534, 1540 (11th Cir. 1994)(recognizing interest identified in *Fordice)*. The Fifth Circuit's prohibition on the consideration of race in admissions notwithstanding (a) the past history of discrimination against African-Americans at the Law School

and throughout the state educational system, (b) the discriminatory impact of the use of the Texas Index and (c) the desirability of maintaining diversity coupled with the virtual certainty that strict use of the Texas Index without considering race would greatly reduce the number of African-Americans admitted to the Law School each provide ample proof of the extent to which Petitioners' interests were subject to impairment.

The Fifth Circuit sought to justify the denial of intervention by determining that the existing parties were able adequately to represent the Petitioners' interests. This finding is contrary to prevailing law and counter to the facts of this case.

This Court has held that an applicant for intervention can satisfy the requirements of Fed. R. Civ. P. 24 (a)(2) by demonstrating that representation by the existing parties *may* be inadequate and that the burden of making that showing is minimal. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (reversing denial of union member's motion for leave to intervene in suit brought by Secretary of Labor pursuant to complaint by that member).

The district court denied the first motion for intervention by employing a standard more stringent than that articulated by this Court in *Trbovich*. Petitioners raised the possibility of conflict in the State's defense of its affirmative action program, noting that the State represented a multiplicity of interests of its numerous citizens, some of whom likely would not share Petitioners' concern for the maintenance of race-conscious admissions, and that the State was potentially liable for acts of discrimination against African-Americans and might thus be less than vigorous in raising defenses that might expose it to liability. Petitioners also made clear their intention to raise questions about the discriminatory effect of the use of the Texas Index as an admissions sorting device. Despite these clearly articulated reasons for believing that the State would not adequately

represent the interests of African-American students, the district court rejected the potential conflict as being speculative. 193a.

Relying on a number of cases in which the state appeared in either a regulatory, enforcement or *parens patriae* capacity, the Fifth Circuit applied a much stronger "state government" presumption of adequacy. 96a.

This presumption was applied in a way which made intervention virtually impossible. Even though there were clearly articulated conflicts in the State's interests in sustaining both its affirmative action plan and its other Law School admissions criteria and even though the State was not only appearing in its *parens patriae* capacity but also as an entity that had constructed and maintained a dual system of education which discriminated on the basis of race and continued to employ practices in admission to the Law School which had a disproportionate impact on African-Americans, the Court below found the presumption of adequate representation was not rebutted.

The second ground for upholding the denial of intervention created a similarly difficult barrier to Petitioners' participation. The Fifth Circuit effectively relied upon a presumption of altruism on the State's part:

> Although the BPLA and the TMLS may have ready access to more evidence than the State, we see no reason they cannot provide this evidence to the State. The BPLA and the TMLS have been authorized to act as amicus and we see no indication that the State would not welcome their assistance.

98a.

By so holding, the Fifth Circuit effectively transformed the legal standard from one under which a potential intervenor must make a minimal showing that existing parties *may* not adequately represent the

intervenor's interest to one under which a movant is required to show that existing parties will categorically refuse to assert a specific defense or introduce specific evidence. Short of obtaining an affidavit or pleading indicating hostile intentions, it is difficult to imagine how such a burden might be met.

The error of enforcing these heightened standards was highlighted by subsequent events in the proceeding. After the State's presentation at trial made clear that the State would not offer Petitioners' defense and evidence and that the Petitioners' interests would be impaired, both the district court and the Fifth Circuit still denied intervention. Neither court addressed the fact that Petitioners' defenses and evidence had undeniably been excluded from the proceedings as a result of the denial of intervention. The district court order contains no discussion whatsoever of the facts. 188a-189a. By its misplaced reliance on the "law of the case" doctrine, the second panel of the Fifth Circuit successfully evaded the impact of its earlier decision.[6] Thus, although Petitioners were proven correct in their belief that the State would not adequately represent their interests, their claims were never properly addressed.

Nor can Petitioners find consolation in the fact that the Fifth Circuit held out the possibility of a new Title VI action directed at the discriminatory effect of the Texas Index. This invitation serves only to emphasize how the courts below subverted the very purposes of the Federal Rules of Civil Procedure by denying intervention. Although it is true that Petitioners could file a new complaint, disposition would have to await the completion of a lengthy and costly new round of litigation on the identical issues

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[6]The assertion by the court below that the first panel "implicitly" passed upon the adequacy of Petitioners' Texas Index claims as a basis for intervention if the evidence were not presented by the State is patently wrong.

raised in the instant case.[7] This clearly frustrates the goal of judicial economy and fairness which inform Fed. R. Civ. P. 24, whose purpose is "to foster economy of judicial administration and to protect non-parties from having their interests adversely affected by litigation conducted without their participation." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977); *United States v. Texas Eastern Transmission Corporation*, 923 F.2d 410, 412 (5th Cir. 1991) (*quoting Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (*en banc*)); *Washington Electric Company v. Massachusetts Municipal Electric Company*, 922 F.2d 92 (2d Cir. 1990); *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir.) *aff'd* 495 U.S. 82 (1989).

The effects of the decisions denying intervention in this action on the ability of African-American Petitioners to protect their interests in being free of discrimination in seeking admissions to the Law School are only exacerbated by the manifest unfairness of excluding the class of victims of prior constitutional and statutory discrimination from proceedings which will have an impact on the very programs designed to remedy prior violations against African-Americans. The unseemly prospect of relegating Petitioners to the role of sideline observers to proceedings that may affect their own future educational opportunities requires

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[7]In fact, the suggested new action would more successfully create a Gordian knot than assure the vindication of all potential interests. Were Petitioners to be successful in an attack alleging the discriminatory effect of the Texas Index either through the judgment of a court or agency or consent judgment with the State, any remedy would be subject to attack by plaintiffs or any similarly situated non-minority Law School applicant. *See Martin v. Wilks*, 490 U.S. 755 (1989). Assuming that the same standard of intervention applied to white movants for intervention as was used for Petitioners, their sole means of recourse would be the initiation of a new action against the State, from which Petitioners again would presumably be excluded. With no reasonable end in sight to these needlessly restricted hearings, the effect on the fair and efficient functioning of the judicial process would be grave.

the grant of certiorari in this case.

CONCLUSION

For the foregoing reasons, Petitioners Thurgood Marshall Legal Society and Black Pre-Law Association respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THURGOOD MARSHALL LEGAL SOCIETY AND
BLACK PRE-LAW ASSOCIATION,
Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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Movants-Appellants.

Douglas CARVELL, et al.,
Plaintiffs-Appellees,
v.
STATE OF TEXAS, et al.,
Defendants-Appellees,
v.
THURGOOD MARSHALL LEGAL SOCIETY and
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Cheryl J. Hopwood, et al., Plaintiffs

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STATE OF TEXAS, et al.,
Defendants-Appellees.

Douglas Carvell, et al., Plaintiffs,

Douglas CARVELL,
Plaintiff-Appellant,
v.
STATE OF TEXAS, et al.,
Defendants-Appellees.

Nos. 94-50569, 94-50664.

United States Court of Appeals,
Fifth Circuit

March 18, 1996.

Before SMITH, WIENER and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

With the best of intentions, in order to increase the enrollment of certain favored classes of minority students, the University of Texas School of Law ("the law school") discriminates in favor of those applicants by giving substantial racial preferences in its admissions program. The beneficiaries of this system are blacks and Mexican Americans, to the detriment of whites and non-preferred minorities. The question we decide today in No. 94-50664 is whether the Fourteenth Amendment permits the school to discriminate in this way.

We hold that it does not. The law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body. "Racial preferences appear to 'even the score' . . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528, 109

S.Ct. 706, 740, 102 L.Ed.2d 854 (1989) (Scalia, J., concurring in the judgment).

As a result of its diligent efforts in this case, the district court concluded that the law school may continue to impose racial preferences. *See Hopwood v. Texas*, 861 F. Supp. 551 (W. D. Tex. 1994). In No. 94-50664, we reverse and remand, concluding that the law school may not use race as a factor in law school admissions. Further, we instruct the court to reconsider the issue of damages in accordance with the legal standards we now explain. In No. 94-50569, regarding the denial of intervention by two black student groups, we dismiss the appeal for want of jurisdiction.

I.

A.

The University of Texas School of Law is one of the nation's leading law schools, consistently ranking in the top twenty. *See, e.g., America's Best Graduate Schools*, U.S. NEWS & WORLD REPORT Mar. 20, 1995, at 84 (national survey ranking of seventeenth). Accordingly, admission to the law school is fiercely competitive, with over 4,000 applicants a year competing to be among the approximately 900 offered admission to achieve an entering class of about 500 students. Many of these applicants have some of the highest grades and test scores in the country.

Numbers are therefore paramount for admission. In the early 1990's, the law school largely based its initial admissions decisions upon an applicant's so-called Texas Index ("TI") number, a composite of undergraduate grade

point average ("GPA") and Law School Aptitude Test ("LSAT") score.[1] The law school used this number as a matter of administrative convenience in order to rank candidates and to predict, roughly, one's probability of success in law school. Moreover, the law school relied heavily upon such numbers to estimate the number of offers of admission it needed to make in order to fill its first-year class.

Of course, the law school did not rely upon numbers alone. The admissions office necessarily exercised judgment in interpreting the individual scores of applicants, taking into consideration factors such as the strength of a student's undergraduate education, the difficulty of his major, and significant trends in his own grades and the undergraduate grades at his respective college (such as grade inflation). Admissions personnel also considered what qualities each applicant might bring to his law school class. Thus, the law school could consider an applicant's background, life experiences, and

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[1]The formulae were written by the Law School Data Assembly Service according to a prediction derived from the success of first-year students in preceding years. As the LSAT was determined to be a better predictor of success in law school, the formulae for the class entering in 1992 accorded an approximate 60% weight to LSAT scores and 40% to GPA.

The formula for students with a three-digit LSAT, see *infra* note 5, was calculated as: LSAT + (10) (GPA) = TI. For students with a two-digit LSAT, the formula was: (1.25) LSAT + (10) GPA = TI.

outlook. Not surprisingly, these hard-to-quantify factors were especially significant for marginal candidates.[2]

Because of the large number of applicants and potential admissions factors, the TI's administrative usefulness was its ability to sort candidates. For the class entering in 1992--the admissions group at issue in this case--the law school placed the typical applicant in one of three categories according to his TI scores: "presumptive admit," "presumptive deny," or a middle "discretionary zone." An applicant's TI category determined how extensive a review his application would receive.

Most, but not all, applicants in the presumptive admit category received offers of admission with little review. Professor Stanley Johanson, the Chairman of the Admissions Committee, or Dean Laquita Hamilton, the Assistant Dean for Admissions, reviewed these files and downgraded only five to ten percent to the discretionary zone because of weaknesses in their applications, generally a noncompetitive major or a weak undergraduate education.

Applicants in the presumptive denial category also received little consideration. Similarly, these files would be reviewed by one or two professors, who could upgrade

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[2]Notably, but of less significance to this appeal, residency also had a strong, if not often determinant, effect. Under Texas law in 1992, the law school was limited to a class of 15% non-residents, and the Board of Regents required an entering class of at least 500 students. The law school therefore had to monitor offers to non-residents carefully, in order not to exceed this quota, while at the same time maintaining an entering class of a manageable size.

them if they believed that the TI score did not adequately reflect potential to compete at the law school. Otherwise, the applicant was rejected.

Applications in the middle range were subjected to the most extensive scrutiny. For all applicants other than blacks and Mexican Americans, the files were bundled into stacks of thirty, which were given to admissions subcommittees consisting of three members of the full admissions committee.

Each subcommittee member, in reviewing the thirty files, could cast a number of votes--typically from nine to eleven[3]--among the thirty files. Subject to the chairman's veto, if a candidate received two or three votes, he received an offer; if he garnered one vote, he was put on the waiting list; those with no votes were denied admission.

Blacks and Mexican Americans were treated differently from other candidates, however. First, compared to whites and non-preferred minorities,[4] the TI

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[3]The number of votes would change over the course of the admissions season in order to achieve the appropriate number of offers.

[4]As blacks and Mexican Americans were the only two minority categories granted preferential treatment in admissions, it is inaccurate to say that the law school conducted separate admissions programs for "minorities" and "non-minorities." While the law school aplication form segregated racial and ethnic classification into seven categories--"Black/African American," "Native American," "Asian American," "Mexican American," "Other Hispanic"

ranges that were used to place them into the three admissions categories were lowered to allow the law school to consider and admit more of them. In March 1992, for example, the presumptive TI admission score for resident whites and non-preferred minorities was 199.[5] Mexican Americans and blacks needed a TI of only 189 to be presumptively admitted.[6] The difference in the

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(meaning non-Mexican descent), "White," and "Other (describe)"--only American blacks and Mexican Americans received the benefit of the separate admissions track. Thus, for example, the law school decided that a black citizen of Nigeria would not get preferential treatment, but a resident alien from Mexico, who resided in Texas, would. Likewise, Asians, American Indians, Americans from El Salvador and Cuba, and many others did not receive a preference. It is important to keep the composition of these categories in mind. For the sake of simplicity and readability, however, we sometimes will refer to two broad categories: "whites" (meaning Texas residents who were whites and non-preferred minorities) and "minorities" (meaning Mexican Americans and black Americans).

[5]Because of a recent change in the grading scale of the LSAT, the law school in 1992 had applicants who had taken an earlier LSAT scored on a 10-to-48 scale and others who had taken a later one scored on a 120-to-180 scale. Equivalence calculations were used to compare scores received on the two scales. For example, TI numbers of 199 (three-digit LSAT) and 87 (two-digit LSAT) were equivalent. For the sake of simplicity, we use three-digit numbers throughout this opinion.

[6]In March 1992, the resident Mexican American and black presumptive admit lines were in parity, but they had not started that way. The initial presumptive admit TI's were 196 for Mexican Americans and 192 for blacks. Thus, initially, blacks received preferential treatment over Mexican Americans by having a lower hurdle to cross to get into the discretionary

presumptive-deny ranges is even more striking. The presumptive denial score for "nonminorities" was 192; the same score for blacks and Mexican Americans was 179.

While these cold numbers may speak little to those unfamiliar with the pool of applicants, the results demonstrate that the difference in the two ranges was dramatic. According to the law school, 1992 resident white applicants had a mean GPA of 3.53 and an LSAT of 164. Mexican Americans scored 3.27 and 158; blacks scored 3.25 and 157. The category of "other minority" achieved a 3.56 and 160.[7]

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zone. In March, Professor Johanson lowered the Mexican American TI in order to admit more of this group.

[7]The median scores of the 1992 class are as follows:

Ethnicity	Resident	Nonresident
	GPA/LSAT	GPA/LSAT
All students	3.52/162	3.61/164
White	3.56/164	3.72/166
Black	3.30/158	3.30/156
Mexican American	3.24/157	3.38/174 *
Other minority	3.58/160	3.77/157

* Only two matriculated applicants.

In 1992, the LSAT's national distribution was approximately as follows:

These disparate standards greatly affected a candidate's chance of admission. For example, by March 1992, because the presumptive denial score for whites was a TI of 192 or lower, and the presumptive admit TI for minorities was 189 or higher, a minority candidate with a TI of 189 or above almost certainly would be admitted, even though his score was considerably below[8] the level

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LSAT	Percentile	2-Digit LSAT
166	94%	43
164	91%	41
162	88%	40
160	83%	39
158	78%	38
156	71%	36

On the basis of these percentiles, one-half of the law school's white resident matriculants were in the top 9% of all test-takers, one-half of the resident Mexican Americans were in approximately the top 25% of test-takers, and one-half of the resident blacks were in the top 22% of test-takers.

[8]To illustrate this difference, we consider the four plaintiffs in this case--Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers. For a student similarly situated to Hopwood, with a GPA of 3.8, to avoid presumptive denial as a white, i.e., to obtain a TI of 193 or above, her LSAT had to be at least a 155, a score in approximately the top 32% of test-takers. If she were black (thus, needing a 180 TI), she would have had to score a 142 on the LSAT, ranking her only in the top 80%. Likewise, a student similar to Carvell, who had a 3.28 GPA, would have needed a "white" LSAT of 160 (top 17%) and a "black" 147 (top 63%). A student like Rodgers with a 3.13 would have needed either a 162 (top 12%) as a white or 149 as a black (top 56%). Finally, a student

at which a white candidate almost certainly would be rejected. Out of the pool of resident applicants who fell within this range (189-192 inclusive), 100% of blacks and 90% of Mexican Americans, but only 6% of whites, were offered admission.[9]

The stated purpose of this lowering of standards was to meet an "aspiration" of admitting a class consisting of 10% Mexican Americans and 5% blacks, proportions roughly comparable to the percentages of those races graduating from Texas colleges. The law school found meeting these "goals" difficult, however, because of uncertain acceptance rates and the variable quality of the applicant pool.[10] In 1992, for example, the entering class contained 41 blacks and 55 Mexican Americans, respectively 8% and 10.7% of the class.

In addition to mintaining separate presumptive TI levels for minorities and whites, the law school ran a segregated application evaluation process. Upon receiving an application form, the school color-coded it according to race. If a candidate failed to designate his race, he was

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like Elliott with a 2.98 GPA would have needed a 163 (top 10%) or 150 (top 53%), respectively.

[9]According to the plaintiffs, 600-700 higher-scoring white residents were passed over before the first blacks were denied admission. There is no specific finding on this assertion, and though the law school does not appear to refute it, we do not rely upon it in making our decision.

[10]Thus, the law school constantly had to adjust its TI range over the course of the admissions season to reach a desired mix. *See supra* note 6.

presumed to be in a nonpreferential category. Thus, race was always an overt part of the review of any applicant's file.

The law school reviewed minority candidates within the applicable discretionary range differently from whites. Instead of being evaluated and compared by one of the various discretionary zone subcommittees, black and Mexican American applicants' files were reviewed by a minority subcommittee of three, which would meet and discuss every minority candidate. Thus, each of these candidates' files could get extensive review and discussion. And while the minority subcommittee reported summaries of files to the admissions committee as a whole, the minority subcommittee's decisions were "virtually final."

Finally, the law school maintained segregated waiting lists, dividing applicants by race and residence. Thus, even many of those minority applicants who were not admitted could be set aside in "minority-only" waiting lists. Such separate lists apparently helped the law school maintain a pool of potentially acceptable, but marginal, minority candidates.[11]

B.

Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers (the "plaintiffs") applied for admission

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[11]The district court did not find, nor is the record clear on, how these different classes of waiting list candidates were compared in the event the law school made last-minute admissions decisions. The record does show that the school carefully monitored the race of applicants in filling the last openings in late spring and early summer.

to the 1992 entering law school class. All four were white residents of Texas and were rejected. The plaintiffs were considered as discretionary zone candidates.[12] Hopwood, with a GPA of 3.8 and an LSAT of 39 (equivalent to a three-digit LSAT of 160), had a TI of 199, a score barely within the presumptive-admit category for resident whites, which was 199 and up. She was dropped into the discretionary zone for resident whites (193 to 198), however, because Johanson decided her educational background overstated the strength of her GPA. Carvell, Elliott, and Rogers had TI's of 197, at the top end of that discretionary zone. Their applications were reviewed by admissions subcommittees, and each received one or no vote.

II.

The plaintiffs sued primarily under the Equal Protection Clause of the Fourteenth Amendment; they also claimed derivative statutory violations of 42 U.S.C. §§ 1981 and 1983 and of title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("title VI").[13] The plaintiffs' central claim is that they were subjected to unconstitutional racial discrimination by the law school's

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[12]The district court discussed in detail the plaintiffs' qualifications and their rejections. See 861 F. Supp. at 564-67.

[13]The defendants are the State of Texas; the University of Texas Board of Regents; the members of the board, named but sued in their official capacities; the University of Texas at Austin; the President of the university, sued in his official capacity; the University of Texas School of Law; the dean of the law school, sued in his official capacity; and the Chairman of the Admissions Committee, sued in his official capacity.

evaluation of their admissions applications. They sought injunctive and declaratory relief and compensatory and punitive damages.

After a bench trial, the district court held that the school had violated the plaintiffs' equal protection rights. 861 F.Supp. at 579. The plaintiffs' victory was pyrrhic at best, however, as the court refused to enjoin the law school from using race in admissions decisions or to grant damages beyond a one-dollar nominal award to each plaintiff. The district court, however, did grant declaratory relief and ordered that the plaintiffs be allowed to apply again without paying the requisite fee. *Id.* at 583.

The district court began by recognizing the proper constitutional standard under which to evaluate the admissions program: strict scrutiny. *Id.* at 568. As it was undisputed that the school had treated applicants disparately based upon the color of their skin, the court asked whether the law school process (1) served a compelling government interest and (2) was narrowly tailored to the achievement of that goal. Under the first prong of the test, the court held that two of the law school's five proffered reasons met constitutional muster: (1) "obtaining the educational benefits that flow from a racially and ethnically diverse student body" and (2) "the objective of overcoming past effects of discrimination." *Id.* at 571.

Significantly, on the second justification, the court rejected the plaintiffs' argument that the analysis of past discrimination should be limited to that of the law school; instead, the court held that the State of Texas's "institutions of higher education are inextricably linked to

the primary and secondary schools in the system." *Id.*[14] Accordingly, the court found that Texas's long history of racially discriminatory practices in its primary and secondary schools in its not-too-distant past had the following present effects at UT law: "the law school's lingering reputation in the minority community, particularly with prospective students, as a 'white' school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities." *Id.* at 572. The court also noted that "were the Court to limit its review to the University of Texas, the Court would still find a 'strong evidentiary basis for concluding that remedial action is necessary.' " *Id.* (citation omitted).

The court next evaluated whether the Texas program was narrowly tailored to further these goals. *Id.* at 573. Applying a four-factor test devised by the Supreme Court, the court held only part of the 1992 admissions scheme unconstitutional. Those parts that gave minorities a "plus," that is, the component of the admissions program that treated candidates' TI scores differently based upon race, was upheld. *Id.* at 578.

The court held, however, that differential treatment was not allowed where candidates of different races were not compared at some point in the admission process. Thus, the court struck down the school's use of separate admissions committees for applications in the discretionary zone, *id.* at 578-79, and in dictum speculated that presumptive denial lines would not pass muster, as

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[14]Because of this conclusion, the district court examined at length the history of race relations in Texas and discrimination in its schools. 861 F. Supp. at 554-57.

many white candidates would get no review, while similarly situated minorities would, *id.* at 576 n.71.

Though it declared that the law school's 1992 admissions program violated the plaintiffs' equal protection rights, the court granted little relief. First, the court did not order that the plaintiffs be admitted to the law school. Instead, it used what it saw as analogous title VII caselaw on burden-shifting to hold that while the state had committed a constitutional violation, the plaintiffs had the ultimate burden of proving damages. *Id.* at 579-80. The court then found that the defendants had proffered a legitimate, non-discriminatory reason for denying the plaintiffs admission and that the plaintiffs had not met their burden of showing that they would have been admitted but for the unlawful system. *Id.* at 582.

Moreover, the court held that the plaintiffs were not entitled to prospective injunctive relief, because "of the law school's voluntary change to a procedure, which on paper and from the testimony, appears to remedy the defects the Court has found in the 1992 procedure." *Id.*[15] To pass muster under the court's reasoning, the law school simply had to have one committee that at one time during the process reviewed all applications and did not establish separate TI numbers to define the presumptive denial categories. In other words, if the law school applied the same academic standards, but had commingled the minoity review in the discretionary zone with the review of whites, its program would not have

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[15]Shortly before trial, apparently in response to the filing of this lawsuit, the law school modified its 1992 admissions practices to fit the district court's view of the proper constitutional system. *See id.* at 582 n.87.

been struck down. The same admissions result would occur, but the process would be "fair." *Id.*

Finally, the court determined that the only appropriate relief was a declaratory judgment and an order allowing the plaintiffs to reapply to the school without charge. *Id.* at 582-83. No compensatory or punitive damages, the court reasoned, could be awarded where the plaintiffs had proven no harm. Moreover, the court reasoned that as the law school had promised to change its admissions program by abandoning the two-committee system, no prospective injunctive relief was justified.

III.

The central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, ___, 113 S. Ct. 2816, 2824, 125 L. Ed. 2d 511 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed. 2d 597 (1976)). It seeks ultimately to render the issue of race irrelevant in governmental decisionmaking. *See Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S. Ct. 1879, 1881-82, 80 L. Ed. 2d 421 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination.") (footnote omitted).

Accordingly, discrimination based upon race is highly suspect. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and "racial discriminations are in most circumstances irrelevant and therefore prohibited.

. . ." *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S. Ct. 1375, 1385, 87 L. Ed. 1774 (1943). Hence, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307, 98 S. Ct. 2733, 2757, 57 L. Ed. 2d 750 (1978) (opinion of Powell, J.); *see also Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967); Brown v. Board of Educ., 347 U.S. 483, 493-94, 74 S. Ct. 686, 691-92, 98 L. Ed. 873 (1954). These equal protection maxims apply to all races. *Adarand Constructors v. Peña*, ___ U.S. ___, ___, 115 S. Ct. 2097, 2111, 132 L. Ed. 2d 158 (1995).

In order to preserve these principles, the Supreme Court recently has required that any governmental action that expressly distinguishes between persons on the basis of race be held to the most exacting scrutiny. *See, e.g., id.* at ___, 115 S. Ct. at 2113; *Loving*, 388 U.S. at 11, 87 S. Ct. at 1823. Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny[16] when evaluating all racial classifications, including those characterized by their proponents as "benign" or "remedial."[17]

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[16]In their initial brief on appeal, the defendants argued that intermediate scrutiny is appropriate here. In a supplemental brief filed to address the subsequent opinion in *Adarand*, they now acknowledge that strict scrutiny is the appropriate test.

[17]*Adarand*, ___ U.S. at ___-___, 115 S. Ct. at 2112-13 (overruling *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990), insofar as it applied intermediate scrutiny to congressionally mandated "benign" racial classifications); *City of Richmond v. J.A. Croson Co.*, 488

Strict scrutiny is necessary because the mere labeling of a classification by the government as "benign" or "remedial" is meaningless. As Justice O'Connor indicated in *Croson*:

> Absent searching judicial inquiry into the justifications for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493, 109 S. Ct. at 721 (plurality opinion).

Under the strict scrutiny analysis, we ask two questions: (1) Does the racial classification serve a

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U.S. 469, 495, 109 S. Ct. 706, 722-23, 102 L. Ed. 2d 854 (1989) (plurality opinion) ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification"); *id.* at 494, 109 S.Ct. at 722 (Scalia, J., concurring in judgment); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273, 106 S.Ct. 1842, 1846, 90 L.Ed.2d 260 (1986) (plurality opinion) ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to government discrimination.").

compelling government interest, and (2) is it narrowly tailored to the achievement of that goal? *Adarand*, ___ U.S. at ___, ___, 115 S. Ct. at 2111, 2117. As the *Adarand* Court emphasized, strict scrutiny ensures that "courts will consistently give racial classifications . . . detailed examination both as to ends and as to means." *Id.*[18]

Finally, when evaluating the proffered governmental interest for the specific racial classification, to decide whether the program in question narrowly achieves that interest, we must recognize that "the rights created by . . . the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S. Ct. 836, 846, 92 L. Ed. 1161 (1948).[19] Thus, the Court consistently has rejected arguments

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[18]While *Adarand*--the Supreme Court's most recent opinion on racial preferences--does not directly address the application of the strict scrutiny test, it underscores the presumptive unconstitutionality of racial classifications. "By requiring strict scrutiny of racial classifications, we require courts to make sure that a government classification based on race, which 'so seldom provide[s] a relevant basis for disparate treatment,' *Fullilove* [*v. Klutznick*, 448 U.S. 448, 534, 100 S. Ct. 2758, 2803, 65 L. Ed. 2d 902 (1980)], (Stevens, J., dissenting), is legitimate, before permitting unequal treatment based on race." ___ U.S. at ___, 115 S. Ct. at 2113.

[19]*See also Adarand*, *id.* at ___, 115 S. Ct. at 2111 ("[A]ny person, of whatever race, has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

conferring benefits on a person based solely upon his membership in a specific class of persons.[20]

With these general principles of equal protection in mind, we turn to the specific issue of whether the law school's consideration of race as a factor in admissions violates the Equal Protection Clause. The district court found both a compelling remedial and a non-remedial justification for the practice.

First, the court approved of the non-remedial goal of having a diverse student body, reasoning that "obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications." 861 F. Supp. at 571. Second, the court determined that the use of racial classifications could be justified as a remedy for the "present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole." *Id.* at 573.

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[20]*See, e.g., Croson*, 488 U.S. at 498-500, 109 S. Ct. at 724-25 (holding that past societal discrimination against a group confers no basis for local governments to provide a specifically tailored remedy to current members of that group); *Wygant*, 476 U.S. at 275-76, 106 S. Ct. at 1847-48 (rejecting argument that governmental discrimination in teacher layoffs is allowed to foster role models within a group).

A.

1.

Justice Powell's separate opinion in *Bakke* provided the original impetus for recognizing diversity as a compelling state interest in higher education. In that case, Allan Bakke, a white male, was denied admission to the Medical School of the University of California at Davis, a state-run institution. Claiming that the State had discriminated against him impermissibly because it operated two separate admissions programs for the medical school, he brought suit under the state constitution, title VI, and the Equal Protection Clause. Under the medical school's admissions system, the white applicants, who comprised the majority of the prospective students, applied through the general admissions program. A special admissions program was reserved for members of "minority groups" or groups designated as "economically and/or educationally disadvantaged." The university set aside sixteen of the one hundred positions in the entering class for candidates from the special program.

The California Supreme Court struck down the program on equal protection grounds, enjoined any consideration of race in the admissions process, and ordered that Bakke be admitted. The United States Supreme Court affirmed in part and reversed in part in an opinion announced by Justice Powell. 438 U.S. at 271-72, 98 S. Ct. at 2738-39 (opinion of Powell, J.). The Court reached no consensus on a justification for its result, however. Six Justices filed opinions, none of which garnered more than four votes (including the writer's). The two major opinions--one four-Justice opinion by

Justices Brennan, White, Marshall, and Blackmun and one by Justice Stevens in which Chief Justice Burger and Justices Stewart and Rehnquist joined--reflected completely contrary views of the law.

While Justice Powell found the program unconstitutional under the Equal Protection Clause and affirmed Bakke's admission, Justice Stevens declined to reach the constitutional issue and upheld Bakke's admission under title VI. Justice Powell also concluded that the California Supreme Court's proscription of the consideration of race in admissions could not be sustained. This became the judgment of the Court, as the four-Justice opinion by Justice Brennan opined that racial classifications designed to serve remedial purposes should receive only intermediate scrutiny. These Justices would have upheld the admissions program under this intermediate scrutiny, as it served the substantial and benign purpose of remedying past societal discrimination.

Hence, Justice Powell's opinion has appeared to represent the "swing vote," and though, in significant part, *see* id. at 272 n. *, 98 S. Ct. at 2738, it was joined by no other Justice, it has played a prominent role in subsequent debates concerning the impact of *Bakke*.[21] In

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[21]*See, e.g.*, Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 24 (1979) (arguing that *Bakke*'s precedential force is governed by the common conclusions of Justices Powell and Stevens, though it is erroneous to conclude that Powell's opinion has "controlling significance on all questions"); Robert G. Dixon, Jr., *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69 (1979) (Justice Powell's "tiebreaking opinion . . . has acquired wide pragmatic appeal.").

the present case, the significance of Justice Powell's opinion is its discussion of compelling state interests under the Equal Protection Clause. See *id.* at 305-15, 98 S. Ct. at 2756-61. Specifically, after Justice Powell recognized that the proper level of review for racial classifications is strict scrutiny, *id.* at 305-06, 98 S. Ct. at 2756-57, he rejected and accepted respective justifications for the school's program as "substantial enough to support the use of a suspect classification," *id.* at 306, 98 S. Ct. at 2757.

Notably, because the first step in reviewing an affirmative action program is a determination of the state's interests at stake,[22] it often is the determinative step. Justice Powell outlined the four state interests proffered by the *Bakke* defendants:

> The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,"; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

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[22]As affirmative action programs are by definition purposeful classifications by race, they do not present the problem of governmental action that is facially neutral but has a disparate impact and is motivated by race. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

Id. at 305-06, 98 S. Ct. at 2756-57 (emphasis added, citation and footnote omitted).

Justice Powell reasoned that the second and third justifications--remedying societal discrimination and providing role models--were never appropriate.[23] He determined that any remedial justification was limited to eliminating "identified discrimination" with "disabling effects." *Id.* at 307, 98 S. Ct. at 2757 (citing the school desegregation cases). He specifically emphasized that a particularized finding of a constitutional or statutory violation must be present before a remedy is justified. He determined not only that such findings were not present in Bakke, but that the medical school was not even in a position to make such findings. *Id.* at 309, 98 S. Ct. at 2757-58.

Justice Powell further reasoned that diversity is a sufficient justification for limited racial classification. *Id.* at 311-16, 98 S. Ct. at 2759-62. "[The attainment of a diverse student body] clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 311, 98 S. Ct. at 2759. He argued that diversity of minorities' viewpoints furthered "academic freedom," an interest under the Constitution. While acknowledging that "academic freedom" does not appear as a constitutional right, he argued that it had "long . . . been

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[23]The Supreme Court subsequently has agreed with that position. *See Wygant*, 476 U.S. at 274-76, 106 S. Ct. at 1847-48 (plurality opinion). The district court *a quo* erred in suggesting that societal discrimination is constitutionally cognizable. *See* 861 F. Supp. at 570 n. 56, 571 n. 60.

viewed as a special concern of the First Amendment." *Id.* at 312, 98 S. Ct. at 2759.[24]

Justice Powell presented this "special concern" as in tension with the Fourteenth Amendment. "Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment." *Id.* at 313, 98 S. Ct. at 2760.[25] The Justice then concluded that

> [a]n otherwise qualified medical student with a particular background--whether it be ethnic, geographic, culturally advantaged or

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[24]*See also Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218, 1 L. Ed. 2d 1311 (1957) (Frankfurter, J., concurring in result) (recognizing four separate components of "academic freedom").

[25]Saying that a university has a First Amendment interest in this context is somewhat troubling. Both the medical school in *Bakke* and, in our case, the law school are state institutions. The First Amendment generally protects citizens from the actions of government, not government from its citizens.

Significantly, *Sweezy* involved a person who was called before the Attorney General of New Hampshire to answer for alleged subversive activities. He declined on First Amendment grounds to answer questions about a lecture he had delivered at the University of New Hampshire. While Justice Frankfurter spoke of a university's interest in openness and free inquiry, it was plainly through the First Amendment rights of individual scholars. 354 U.S. at 262, 266-67, 77 S. Ct. at 1217-18, 1219-20 (Frankfurter, J., concurring in result).

> disadvantaged--may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Id. at 314, 98 S. Ct. at 2760 (footnote omitted). Justice Powell therefore approved of a consideration of ethnicity as "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.*

The next step for Justice Powell was to decide whether the medical school's program was necessary to further the goal of diversity. He said it was not. As the program made race the only determining factor for a certain number of the open spots that had been set aside, it did not further full diversity but only a conception of that term limited to race.

Justice Powell speculated that a program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet does not insulate the individual from comparison with all the other candidates for the available seats," might pass muster. *Id.* at 317, 98 S. Ct. at 2762. The Justice did not define what he meant by a "plus," but he did write that a "plus" program would be one in which an

> applicant who loses out to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would only mean that his combined qualifications,

> which may have included similar nonobjective factors, did not outweigh those of another applicant. His qualifications would have been weighted fairly and competitively, and he would have no basis to complaint of unequal treatment under the Fourteenth Amendment.

Id. at 318, 98 S. Ct. at 2762.

Under this conception of the Fourteenth Amendment, a program that considered a host of factors that include race would be constitutional, even if an applicant's race "tipped the scales" among qualified applicants. What a school could not do is to refuse to compare applicants of different races or establish a strict quota on the basis of race. In sum, Justice Powell found the school's program to be an unconstitutional "quota" system, but he intimated that the Constitution would allow schools to continue to use race in a wide-ranging manner.

2.

Here, the plaintiffs argue that diversity is not a compelling governmental interest under superseding Supreme Court precedent. Instead, they believe that the Court finally has recognized that only the remedial use of race is compelling. In the alternative, the plaintiffs assert that the district court misapplied Justice Powell's *Bakke* standard, as the law school program here uses race as a strong determinant rather than a mere "plus" factor and, in any case, the preference is not narrowly applied. The law school maintains, on the other hand, that Justice Powell's formulation in Bakke is law and must be followed--at least in the context of higher education.

We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.

Justice Powell's view in *Bakke* is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In *Bakke*, the word "diversity" is mentioned nowhere except in Justice Powell's single-Justice opinion. In fact, the four-Justice opinion, which would have upheld the special admissions program under intermediate scrutiny, implicitly rejected Justice Powell's position. *See* 438 U.S. at 326 n. 1, 98 S. Ct. at 2766 n. 1 (Brennan, White, Marshall, and Blackmun JJ., concurring in the judgment in part and dissenting) ("We also agree with Mr. Justice POWELL that a plan like the "Harvard" plan . . . is constitutional under our approach, *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.*") (emphasis added). Justice Stevens declined to discuss the constitutional issue. *See id.* at 412, 98 S. Ct. at 2810 (Stevens, J., concurring in the judgment in part and dissenting in part).

Thus, only one Justice concluded that race could be used solely for the reason of obtaining a heterogenous

student body. As the *Adarand* Court states, the *Bakke* Court did not express a majority view and is questionable as binding precedent. ___ U.S. at ___, 115 S. Ct. at 2109 ("The Court's failure in *Bakke* . . . left unresolved the proper analysis for remedial race-based government action.").

Since *Bakke*, the Court has accepted the diversity rationale only once in its cases dealing with race. Significantly, however, in that case, *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 564-65, 110 S. Ct. 2997, 3008-09, 111 L. Ed. 2d 445 (1990), the five-Justice majority relied upon an intermediate scrutiny standard of review to uphold the federal program seeking diversity in the ownership of broadcasting facilities. In *Adarand*, ___ U.S. at ___-___, 115 S. Ct. at 2112-13, the Court squarely rejected intermediate scrutiny as the standard of review for racial classifications, and *Metro Broadcasting* is now specifically overruled to the extent that it was in conflict with this holding. *Id.* at ___, 115 S. Ct. at 2113. No case since *Bakke* has accepted diversity as a compelling state iterest under a strict scrutiny analysis.

Indeed, recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny. Foremost, the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs. In *Croson*, 488 U.S. at 493, 109 S. Ct. at 722 (plurality opinion), the Court flatly stated that "[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact

promote notions of racial inferiority and lead to a politics of racial hostility." (emphasis added).[26]

Justice O'Connor, in her *Adarand*-vindicated dissent in *Metro Broadcasting*, joined by Justices Rehnquist, Scalia, and Kennedy, explained this position:

> Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not

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[26] *See also Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.) ("The whole point of *Croson* is that disadvantage, *diversity*, or other grounds favoring minorities will not justify governmental racial discrimination . . .; only a purpose of remedying discrimination against minorities will do so.") (emphasis added), *cert. denied*, 500 U.S. 954, 111 S. Ct. 2261, 114 L. Ed. 2d 714 (1991).

Notably, Justice Scalia rejected the use of racial classifications "in order (in a broad sense) 'to ameliorate the effects of past discrimination.' " *Croson*, 488 U.S. at 520, 109 S. Ct. at 736 (Scalia, J., concurring in the judgment) (quoting *Croson*, 488 U.S. at 476-77, 109 S. Ct. at 713). He, however, suggested one other possible compelling state interest: a social emergency. He opined that "where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb" will justify racial classifications. *Croson*, 488 U.S. at 521, 109 S. Ct. at 736 (Scalia, J., concurring in judgment). While such an interest is probably consistent with the widely criticized holdings of *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943), and *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), plainly such an interest is not presented in this case.

> a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.

497 U.S. at 612, 110 S. Ct. at 3034 (O'Connor, J., dissenting). Indeed, the majority in *Metro Broadcasting* had not claimed otherwise and decided only that such an interest was "important." Justice Thomas, who joined the Court after *Metro Broadcasting* was decided, roundly condemned "benign" discrimination in his recent *Adarand* opinion, in which he suggests that the diversity rationale is inadequate to meet strict scrutiny. *See Adarand*, ___ U.S. at ___, 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in judgment).[27]

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[27]The law school places much reliance upon Justice O'Connor's concurrence in *Wygant* for the proposition that Justice Powell's *Bakke* formulation is still viable. In her 1986 *Wygant* opinion, in the context of discussing Justice Powell's opinion, Justice O'Connor noted that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 476 U.S. at 286, 106 S. Ct. at 1853 (O'Connor, J., concurring in part and concurring in the judgment).

The law school's argument is not persuasive. Justice O'Connor's statement is purely descriptive and did not purport to express her approval or disapproval of diversity as a compelling interest. Her subsequent statements outlined above in *Croson* and *Metro Broadcasting* suggest strongly that reliance upon this statement in *Wygant* is unjustified.

In short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not.

Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants. Thus, the Supreme Court has long held that governmental actors cannot justify their decisions solely because of race. *See, e.g., Croson*, 488 U.S. at 496, 109 S. Ct. at 723 (plurality opinion); *Bakke*, 438 U.S. at 307, 98 S. Ct. at 2757 (opinion of Powell, J.).

Accordingly, we see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge.

While the use of race *per se* is proscribed, state-supported schools may reasonably consider a host of

factors--some of which may have some correlation with race--in making admissions decisions. The federal courts have no warrant to intrude on those executive and legislative judgments unless the distinctions intrude on specific provisions of federal law or the Constitution.

A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background.[28]

For this reason, race often is said to be justified in the diversity context, not on its own terms, but as a proxy for other characteristics that institutions of higher education value but that do not raise similar constitutional concerns.[29] Unfortunately, this approach simply

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[28]The law school's admissions program makes no distinction among black and Mexican American applicants in an effort to determine which of them, for example, may have been culturally or educationally disadvantaged.

[29]For example, Justice Powell apparently felt that persons with different ethnic backgrounds would bring diverse "experiences, outlooks, and ideas" to the medical school. *Bakke*, 438 U.S. at 314, 98 S. Ct. at 2760 (opinion of Powell, J.).

replicates the very harm that the Fourteenth Amendment was designed to eliminate.

The assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group. This assumption, however, does not withstand scrutiny. "[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 12 (1974).

To believe that a person's race controls his point of view is to stereotype him. The Supreme Court, however, "has remarked a number of times, in slightly different contexts, that it is incorrect and legally inappropriate to impute to women and minorities 'a different attitude about such issues as the federal budget, school prayer, voting, and foreign relations.' " Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1000 (1993) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 627-28, 104 S. Ct. 3244, 3255, 82 L. Ed. 2d 462 (1984)). "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they

act or think." *Metro Broadcasting*, 497 U.S. at 602, 110 S. Ct. at 3029 (O'Connor, J., dissenting).[30]

Instead, individuals, with their own conceptions of life, further diversity of viewpoint. Plaintiff Hopwood is a fair example of an applicant with a unique background. She is the now-thirty-two-year-old wife of a member of the Armed Forces stationed in San Antonio and, more significantly, is raising a severely handicapped child. Her circumstance would bring a different perspective to the law school. The school might consider this an advantage to her in the application process, or it could decide that her family situation would be too much of a burden on her academic performance.

We do not opine on which way the law school should weigh Hopwood's qualifications; we only observe that "diversity" can take many forms. To foster such diversity, state universities and law schools and other governmental entities must scrutinize applicants

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[30]Thus, to put it simply, under the Equal Protection Clause

> the distribution of benefits and costs by government on racial or ethnic grounds is impermissible. Even though it is frequently efficient to sort people by race or ethnic origin, because racial or ethnic identity may be a good proxy for functional classifications, efficiency is rejected as a basis for governmental action in this context.

Posner, *supra*, at 22.

individually, rather than resorting to the dangerous proxy of race.[31]

The Court also has recognized that government's use of racial classifications serves to stigmatize. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 494, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954) (observing that classification on the basis of race "generates a feeling of inferiority"). While one might argue that the stigmatization resulting from so-called "benign" racial classifications is not as

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[31]We recognize that the use of some factors such as economic or educational background of one's parents may be somewhat correlated with race. This correlation, however, will not render the use of the factor unconstitutional if it is not adopted for the purpose of discriminating on the basis of race. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). As Justice O'Connor indicated in *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), which was a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), based upon the prosecution's strike of potential jurors who spoke Spanish:

> No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is.

500 U.S. at 375, 111 S. Ct. at 1874 (O'Connor, J., joined by Scalia, J., concurring in the judgment).

harmful as that arising from invidious ones,[32] the current Court has now retreated from the idea that so-called benign and invidious classifications may be distinguished.[33] As the plurality in *Croson* warned, "[c]lassifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial

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[32]According to one of the four-Justice opinions in *Bakke*, racial classifications stigmatize when "they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separation." 438 U.S. at 357-58, 98 S. Ct. at 2782 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). In *Bakke*, however, these Justices rejected strict scrutiny because the program at issue could not be said to stigmatize as did other racial classifications. These Justices nevertheless recognized that rational-basis scrutiny would not be enough. *Id.* at 361, 98 S. Ct. at 2784 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

[33]As Judge Posner has indicated,

> the proper constitutional principle is not, no "invidious" racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens . . . . To ask whether racial exclusion may not have overriding benefits for both races in particular circumstances is to place the antidiscrimination principle at the mercy of the vagaries of empirical conjecture and thereby free the judge to enact his personal values into constitutional doctrine.

Posner, *supra*, at 25-26.

inferiority and lead to the politics of racial hostility." 488 U.S. at 493, 109 S. Ct. at 722.[34]

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[34]*See also Adarand*, ___ U.S. at ___, 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in judgment) ("But there can be no doubt that racial paternalism and its unintended consequences may be as poisonous and pernicious as any other form of discrimination."). One prominent constitutional commentator specifically has noted that where programs involve lower and separate standards of selection, "a new badge of implied inferiority, assigned as an incident of governmental noblesse oblige," results.

> Explicit in state, local, or federal plans using separate and lower standards by race is a statement by government that certain persons identified by race are in fact being placed in positions they may be presumed not likely to hold but for their race (because they are presumed to be unable to meet standards the government itself requires to be met). The message from government is written very large when these plans proliferate: a double (and softer) standard for admission, a double (and softer) standard for hiring, a double (and softer) standard for promotion, a double (and softer) standard for competitive bidding, and so on. Without question, this is a systematic racial tagging by government--a communication to others that the race of the individual they deal with bespeaks a race-related probability, created solely by the government itself, of lesser qualification than others holding equivalent positions.

William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 787 n.38 (1979).

Finally, the use of race to achieve diversity undercuts the ultimate goal of the Fourteenth Amendment: the end of racially motivated state action. Justice Powell's conception of race as a "plus" factor would allow race always to be a potential factor in admissions decisionmaking. While Justice Blackmun recognized the tension inherent in using race-conscious remedies to achieve a race-neutral society, he nevertheless accepted it as necessary. *Bakke*, 438 U.S. at 405, 98 S. Ct. at 2806. Several Justices who, unlike Justices Powell and Blackmun, are still on the Court, have now renounced toleration of this tension, however. *See Croson*, 488 U.S. at 495, 109 S. Ct. at 722 (plurality opinion of O'Connor, J.) ("The dissent's watered down version of equal protection review effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from government decisionmaking such irrelevant factors as a human being's race . . . will never be achieved.") (quoting *Wygant*, 476 U.S. at 320, 106 S. Ct. at 1871 (Stevens, J., dissenting)).[35]

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[35]As professor Van Alstyne has argued:

> Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life--or in the life or practices of one's government--the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

In sum, the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny.[36] These latter factors may, in fact, turn out to be substantially correlated with race, but the key is that race itself not be taken into account. Thus, that portion of the district court's opinion upholding the diversity rationale is reversibly flawed.[37]

Van Alstyne, *supra* note 34, at 809-10.

[36]Because we have determined that any consideration of race by the law school is constitutionally impermissible if justified by diversity, it is not necessary to determine whether, as plaintiffs argue, the admissions system under which the plaintiffs applied operated as a *de facto* "quota" system similar to the one struck down in *Bakke*. We do note that even if a "plus" system were permissible, it likely would be impossible to maintain such a system without degeneration into nothing more than a "quota" program. *See Bakke*, 438 U.S. at 378, 98 S. Ct. at 2793 ("For purposes of constitutional adjudication, there is no difference between [setting aside a certain number of places for minorities and using minority status as a positive factor].") (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Indeed, in this case, the law school appeared to be especially adept at meeting its yearly "goals." *See Hopwood*, 861 F. Supp. at 574 n. 67.

[37]Plaintiffs additionally have argued that the law school's program was not narrowly tailored in the diversity context because (1) it failed to award preferences to non-Mexican Hispanic Americans, Asian Americans, American Indians, or other minorities, and (2) it failed to accord as much weight to non-racial diversity factors, such as religion and socioeconomic background, as it did to race.

B.

We now turn to the district court's determination that "the remedial purpose of the law school's affirmative action program is a compelling government objective." 861 F. Supp. at 573. The plaintiffs argue that the court erred by finding that the law school could employ racial criteria to remedy the present effects of past discrimination in Texas's primary and secondary schools. The plaintiffs contend that the proper unit for analysis is the law school, and the state has shown no recognizable present effects of the law school's past discrimination. The law school, in response, notes Texas's well-documented history of discrimination in education and argues that its effects continue today at the law school, both in the level of educational attainment of the average minority applicant and in the school's reputation.

In contrast to its approach to the diversity rationale, a majority of the Supreme Court has held that a state actor may racially classify where it has a "strong basis in the evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500, 109 S. Ct. at 730 (quoting *Wygant*, 476 U.S. at 277, 106 S. Ct. at 1849 (plurality opinion)). Generally, "[i]n order to justify an affirmative action program, the State must show there are 'present effects of past discrimination.' " *Hopwood v. Texas* ("*Hopwood I*"),[38] 21 F.3d 603, 605 (5th Cir. 1994) (per curiam) (quoting *Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2001, 131 L. Ed. 2d 1002 (1995)); *see also Wygant*, 476

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[38]*Hopwood I* is the first appeal of the intervention issue that we address *infra*.

U.S. at 280, 106 S. Ct. at 1850 (opining that "in order to remedy the effects of prior discrimination, it may be necessary to take race into account") (opinion of Powell, J.).[39]

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[39]Unfortunately, the precise scope of allowable state action is of somewhat undefined contours. Indeed, it is not evident whether permitted remedial action extends to the "present effects of past discrimination." This language, derived from Justice Brennan's opinion in *Bakke*, 438 U.S. at 362-66, 98 S. Ct. at 2784-87, appears intended to present little resistance to wide-ranging affirmative action plans.

While Justice Brennan began by stating that schools have a duty affirmatively to erase the vestiges of their past discriminatory practices, he compared this duty to the power of Congress to enforce § 1 of the Fourteenth Amendment through § 5. He reasoned that under that wide-ranging power, the beneficiaries of such a program need not present proof that they were discriminated against; a showing that they were in the general class was sufficient. *Id.* at 363-64, 98 S. Ct. at 2785-86. Nor would a school need judicial findings of past discrimination. *Id.* at 364, 98 S. Ct. at 2785-86. Finally, he argued that such beneficiaries would not even have to show that that school had a history of past discrimination, but need only suggest that they were the victims of general societal discrimination that prevented them from being otherwise qualified to enter the school. *Id.* at 365-66, 98 S. Ct. at 2786-87. Hence, under this standard, almost any school could adopt an affirmative action plan.

There is no question, however, that subsequent Supreme Court opinions, notably *Wygant* and *Croson*, have rejected broad state programs that purport to be remedial and that, presumably, would have satisfied Justice Brennan's standard for meeting the "present effects of past discrimination." And some members of the Court would limit

Because a state does not have a compelling state interest in remedying the present effects of past societal discrimination, however, we must examine the district court's legal determination that the relevant governmental entity is the system of education within the state as a whole. Moreover, we also must review the court's identification of what types of present effects of past discrimination, if proven, would be sufficient under strict scrutiny review. Finally, where the state actor puts forth a remedial justification for its racial classifications, the district court must make a "factual determination" as to whether remedial action is necessary. *Wygant*, 476 U.S. at 277-78, 106 S. Ct. at 1848-49. We review such factual rulings for clear error.

1.

The Supreme Court has "insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274, 106 S. Ct. at 1847 (plurality

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any remedial purpose to the actual victims of discrimination. *See Adarand*, ___ U.S. at ___, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in judgment) ("[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."). Nevertheless, we will not eschew use of the phrase "present effects of past discrimination," as we used this language in *Hopwood I*, 21 F.3d at 605, and another circuit did so in *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2001, 131 L. Ed. 2d 1002 (1995). We will, however, limit its application in accordance with *Wygant* and *Croson*.

opinion of Powell, J.) (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (1977)).[40] In *Wygant*, the Court analyzed a collective bargaining agreement between a school board and a teacher's union that allowed the board to give minorities preferential treatment in the event of layoffs. A plurality rejected the theory that such a program was justified because it provided minority role models. *Id.* at 274-77, 106 S. Ct. at 1847-49 (plurality opinion). Such a claim was based upon remedying "societal discrimination," a rationale the Court consistently has rejected as a basis for affirmative action. Accordingly, the state's use of remedial racial classifications is limited to the harm caused by a specific state actor.[41]

Moreover, the plurality in *Wygant* held that before a state actor properly could implement such a plan, it "must ensure that . . . it has convincing evidence that remedial action is warranted." *Id.* at 277, 106 S. Ct. at 1848. *Accord id.* at 289, 106 S. Ct. at 1854-55 (O'Connor,

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[40]*See Wygant*, 476 U.S. at 286, 106 S. Ct. at 1853 (opinion of O'Connor, J., concurring in part and concurring in judgment) ("The Court is in agreement that whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant remedial use of a carefully constructed affirmative action program.").

[41]*See also id.* at 288, 106 S. Ct. at 1854 (O'Connor, J., concurring in part and concurring in judgment) ("I agree with the plurality that a government agency's interest in remedying 'societal' discrimination, that is discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.").

J., concurring in part and concurring in judgment). The plurality felt that "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 276, 106 S. Ct. at 1848.

The *Croson* Court further discussed how to identify the relevant past discriminator. Writing for the Court, Justice O'Connor struck down a minority business set-aside program implemented by the City of Richmond and justified on remedial grounds. While the district court opined that sufficient evidence had been found by the city to believe that such a program was necessary to remedy the present effects of past discrimination in the construction industry, the Court held:

> Like the "role model" theory employed in *Wygant*, a generalized assertion that there had been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.' *Wygant*, 476 U.S. at 275 [106 S. Ct. at 1848] (plurality opinion). 'Relief' for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority businesses] in Richmond mirrored the percentage of minorities in the population as a whole.

488 U.S. at 498, 109 S. Ct. at 724.[42] The Court refused to accept indicia of past discrimination in anything but

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[42]Justice O'Connor was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy in this portion of the opinion.

"the Richmond construction industry." *Id.* at 505, 109 S. Ct. at 728.

In addition, in a passage of particular significance to the instant case, the Court analogized the employment contractor situation to that of higher education and noted that "[l]ike claims that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.* at 499, 109 S. Ct. at 724. Such claims were based upon "sheer speculation" about how many minorities would be in the contracting business absent past discrimination. *Id.*

Applying the teachings of *Croson* and *Wygant*, we conclude that the district court erred in expanding the remedial justification to reach all public education within the State of Texas. The Supreme Court repeatedly has warned that the use of racial remedies must be carefully limited, and a remedy reaching all education within a state addresses a putative injury that is vague and amorphous. It has "no logical stopping point." *Wygant*, 476 U.S. at 275, 106 S. Ct. at 1847 (plurality opinion).

The district court's holding employs no viable limiting principle. If a state can "remedy" the present effects of past discrimination in its primary and secondary schools, it also would be allowed to award broad-based preferences in hiring, government contracts, licensing, and any other state activity that in some way is affected by the educational attainment of the applicants. This very argument was made in *Croson* and rejected:

> The "evidence" relied upon by the dissent, history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.

488 U.S. at 505, 109 S. Ct. at 728. The defendants' argument here is equally expansive.[43]

Strict scrutiny is meant to ensure that the purpose of a racial preference is remedial. Yet when one state actor begins to justify racial preferences based upon the actions of other state agencies, the remedial actor's competence to determine the existence and scope of the harm--and the appropriate reach of the remedy--is called into question. The school desegregation cases, for example, concentrate on school districts--singular government units--and the use of interdistrict remedies is strictly limited. *See Missouri v. Jenkins*, ___ U.S. ___, ___, 115 S. Ct. 2038, 2048, 132 L. Ed. 2d 63 (1995); *Milliken v. Bradley*, 418 U.S. 717, 745, 94 S. Ct. 3112, 3127, 41 L. Ed. 2d 1069 (1974) ("[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong

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[43]The fact that the plaintiffs named the State of Texas as one defendant does not mean that it is proper to scrutinize the state as the relevant past discriminator. This argument confuses a theory of liability with a justification for a limited racial remedy. The State of Texas simply may be responsible for the wrongs of the law school, which is a governmental entity the state has created. The Supreme Court, however, has limited the remedial interest to the harm wrought by a specific governmental unit.

calling for an interdistrict remedy."). Thus, one justification for limiting the remedial powers of a state actor is that the specific agency involved is best able to measure the harm of its past discrimination.

Here, however, the law school has no comparative advantage in measuring the present effects of discrimination in primary and secondary schools in Texas. Such a task becomes even more improbable where, as here, benefits are conferred on students who attended out-of-state or private schools for such education. Such boundless "remedies" raise a constitutional concern beyond mere competence. In this situation, an inference is raised that the program was the result of racial social engineering rather a desire to implement a remedy.

No one disputes that in the past, Texas state actors have discriminated against some minorities in public schools. In this sense, some lingering effects of such discrimination is not "societal," if that term is meant to exclude all state action. But the very program at issue here shows how remedying such past wrongs may be expanded beyond any reasonable limits.

Even if, arguendo, the state is the proper government unit to scrutinize, the law school's admissions program would not withstand our review. For the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the "plus" given to applicants to remedy that harm. A broad program that sweeps in all minorities with a remedy that is in no way related to past

harms cannot survive constitutional scrutiny. Obviously, none of those predicates has been satisfied here.

We further reject the proposition that the University of Texas System, rather than the law school, is the appropriate governmental unit for measuring a constitutional remedy. The law school operates as a functionally separate unit within the system. As with all law schools, it maintains its own separate admissions program. The law school hires faculty members that meet the unique requirements of a law school and has its own deans for administrative purposes. Thus, for much the same reason that we rejected the educational system as the proper measure--generally ensuring that the legally-imposed racially discriminatory program is remedial--we conclude that the University of Texas System is itself too expansive an entity to scrutinize for past discrimination.[44]

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[44]And again, any such remedy here would be grossly speculative. As the defendants concede and the district court found, there is no recent history of overt sanctioned discrimination at the University of Texas. *Hopwood*, 861 F. Supp. at 572. Nor does the record even suggest such discrimination at any of the other component schools of the University of Texas System. Thus, any harm caused to the students of those institutions would be the result of the present effects of *past discrimination*.

We do note that the law school is not autonomous. In Texas, the management of higher education has been divided by the legislature into different "systems." *See* 12 TEX. JUR. 3D, *Colleges and Universities* § 2 (1993). The University of Texas at Austin, with which the law school is associated, is part of the University of Texas System. TEX. EDUC. CODE ANN. §§ 67.01 to 67.62 (West 1991). Accordingly, the legislature,

In sum, for purposes of determining whether the law school's admissions system properly can act as a remedy for the present effects of past discrimination, we must identify the law school as the relevant alleged past discriminator. The fact that the law school ultimately may be subject to the directives of others, such as the board of regents, the university president, or the legislature, does not change the fact that the relevant putative discriminator in this case is still the law school. In order for any of these entities to direct a racial preference program at the law school, it must be because of past wrongs at that school.

2.

Next, the relevant governmental discriminator must prove that there are present effects of past discrimination of the type that justify the racial classifications at issue:

> To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the

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which has ultimate control over the school, has delegated its "management and control" to the regents of the University of Texas System. *Id.* § 67.02. Thus, the law school is governed by both the legislature and the university's board of regents. Yet, while the state's higher authorities may have the power to require the law school to remedy its past wrongs, they may do so consistently with the Constitution only if the remedial actions are directed at the law school. This requirement is what the Supreme Court dictated by limiting the remedial purpose to the "governmental unit involved." *Wygant*, 476 U.S. at 274, 106 S. Ct. at 1847 (plurality opinion).

> past discrimination and that the effect is of sufficient magnitude to justify the program.

Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2001, 131 L. Ed. 2d 1002 (1995). Moreover, as part of showing that the alleged present effects of past discrimination in fact justify the racial preference program at issue, the law school must show that it adopted the program specifically to remedy the identified present effects of the past discrimination.

Here, according to the district court: "The evidence presented at trial indicates those effects include the law school's lingering reputation in the minority community, particularly with prospective students, as a "white" school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities." 861 F. Supp. at 572. Plaintiffs now argue that these three alleged effects are at most examples of societal discrimination, which the Supreme Court has found not to be a valid remedial basis. "The effects must themselves be examined to see whether they were caused by the past discrimination and whether they are of a type that justifies the program." *Podberesky*, 38 F.3d at 154.

As a legal matter, the district court erred in concluding that the first and third effects it identified--bad reputation and hostile environment--were sufficient to sustain the use of race in the admissions process. The Fourth Circuit examined similar arguments in *Podberesky*, a recent case that struck down the use of race-based scholarships. The university in that case sought, in part, to justify a separate scholarship program based solely

upon race because of the university's "poor reputation within the African-American community" and because "the atmosphere on campus [was] perceived as being hostile to African-American students." *Id.* at 152.

The *Podberesky* court rejected the notion that either of these rationales could support the single-race scholarship program. The court reasoned that any poor reputation by the school "is tied solely to knowledge of the University's discrimination before it admitted African-American students." *Id.* at 154. The court found that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this." *Id.*

We concur in the Fourth Circuit's observation that knowledge of historical fact simply cannot justify current racial classifications. Even if, as the defendants argue, the law school may have a bad reputation in the minority community, "[t]he case against race-based preferences does not rest on the sterile assumption that American society is untouched or unaffected by the tragic oppression of its past." *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1079 (4th Cir. 1993). "Rather, it is the very enormity of that tragedy that lends resolve to the desire to never repeat it, and find a legal order in which distinctions based on race shall have no place." *Id.* Moreover, we note that the law school's argument is even weaker than that of the university in *Podberesky*, as there is no dispute that the law school has never had an admissions policy that excluded Mexican Americans on the basis of race.

The *Podberesky* court rejected the hostile-environment claims by observing that the "effects"--that is, racial tensions--were the result of present societal discrimination. 38 F.3d at 155. There was simply no showing of action by the university that contributed to any racial tension. Similarly, one cannot conclude that the law school's past discrimination has created any current hostile environment for minorities. While the school once did practice *de jure* discrimination in denying admission to blacks, the Court in *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), struck down the law school's program. Any other discrimination by the law school ended in the 1960's. *Hopwood*, 861 F. Supp. at 555.

By the late 1960's, the school had implemented its first program designed to recruit minorities, *id.* at 557, and it now engages in an extensive minority recruiting program that includes a significant amount of scholarship money. The vast majority of the faculty, staff, and students at the law school had absolutely nothing to do with any discrimination that the law school practiced in the past.

In such a case, one cannot conclude that a hostile environment is the present effect of past discrimination. Any racial tension at the law school is most certainly the result of present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions.

Even if the law school's alleged current lingering reputation in the minority community--and the perception that the school is a hostile environment for minorities--were considered to be the present effects of past

discrimination, rather than the result of societal discrimination, they could not constitute compelling state interests justifying the use of racial classifications in admissions. A bad reputation within the minority community is alleviated not by the consideration of race in admissions, but by school action designed directly to enhance its reputation in that community.

Minority students who are aided by the law school's racial preferences have already made the decision to apply, despite the reputation. And, while prior knowledge that they will get a "plus" might make potential minorities more likely to apply, such an inducement does nothing, per se, to change any hostile environment. As we have noted, racial preferences, if anything, can compound the problem of a hostile environment.[45]

The law school wisely concentrates only on the second effect the district court identified: underrepresentation of minorities because of past discrimination. The law school argues that we should consider the prior discrimination by the State of Texas and its educational system rather than of the law school. The school contends that this prior discrimination by the state had a direct effect on the educational attainment of the pool of minority applicants and that the discriminatory admissions program was implemented partially to discharge the school's duty of eliminating the vestiges of past segregation.

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[45]The testimony of several minority students underscores this point. They stated generally that they felt that other students did not respect them because the other students assumed that minorities attained admission because of the racial preference program.

As we have noted, the district court accepted the law school's argument that past discrimination on the part of the Texas school system (including primary and secondary schools), reaching back perhaps as far as the education of the parents of today's students, justifies the current use of racial classifications.[46] No one disputes that Texas has a history of racial discrimination in education. We have already discussed, however, that the *Croson* Court unequivocally restricted the proper scope of the remedial interest to the state actor that had previously discriminated. 488 U.S. at 499, 109 S. Ct. at 724-25. The

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[46]The argument is that because the state discriminated in its primary and secondary school systems, the students' educational attainment was adversely affected, and this harm extended to their higher education, thus justifying giving current applicants a "plus" based on race. This reasoning is especially important in justifying benefits for Mexican Americans, as there is no evidence that the law school implemented *de jure* (or even *de facto*) discrimination against this group in its admissions process. Because this logic ignores the relevant actions in this case, i.e., discrimination by the law school, it is not necessary for us to examine the potential causational flaws in the argument.

Moreover, if we did find that the past wrongs of Texas school districts were the sort of discrimination that the law school could address, the school still would have to prove the present effects of that past wrong. Without some strong evidence in the record showing that today's law school applicants still bear the mark of those past systems, such effects seem grossly speculative. The district court simply assumed that "[t]his segregation has handicapped the educational achievement of many minorities . . . ." 861 F. Supp. at 573. And we would still have to ask whether the program was narrowly tailored to this goal.

district court squarely found that "[i]n recent history, there is no evidence of overt officially sanctioned discrimination at the University of Texas." 861 F. Supp. at 572. As a result, past discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions.

The law school now attempts to circumvent this result by claiming that its racial preference program is really a "State of Texas" plan rather than a law school program. Under the law school's reading of the facts, its program was the direct result of the state's negotiations with what was then the United States Department of Health, Education and Welfare's Office for Civil Rights ("OCR"). To bring the Texas public higher education system into compliance with title VI, the state adopted the so-called "Texas Plan."

In light of our preceding discussion on the relevant governmental unit, this argument is inapposite. Even if the law school were specifically ordered to adopt a racial preference program, its implementation at the law school would have to meet the requirements of strict scrutiny.[47]

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[47]To the extent that the OCR has required actions that conflict with the Constitution, the directives cannot stand. The Supreme Court has addressed required state compliance with federal law in the voting rights context. *Miller v. Johnson*, ___ U.S. ___, ___, 115 S. Ct. 2475, 2491, 132 L. Ed. 2d 762 (1995) ("As we suggested in *Shaw* [*v. Reno*, 509 U.S. 630, ___-___, 113 S. Ct. 2816, 2830-31, 125 L. Ed. 2d 511 (1993)], compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary *under a constitutional reading and application of those laws*.") (emphasis added).

Moreover, these alleged actions in the 1980's are largely irrelevant for purposes of this appeal. There is no indication that the Texas Plan imposed a direct obligation upon the law school. To the contrary, the law school's admissions program was self-initiated. Moreover, the current admissions program was formulated primarily in the 1990's, and the district court did not hold otherwise. *See* 861 F. Supp. at 557 ("Against this historical backdrop [including Texas's dealing with the OCR], the law school's commitment to affirmative action in the admissions process evolved."). Thus it is no more correct to say that the State of Texas implemented the program at issue than it is to assert that the Commonwealth of Virginia, not the City of Richmond, was responsible for the minority set-aside program in *Croson*.

The district court also sought to find a remedial justification for the use of race and, at the same time, attempted to distinguish *Croson* using *United States v. Fordice*, 505 U.S. 717, 112 S. Ct. 2727, 120 L. Ed. 2d 575 (1992). The court held that the law school had a compelling interest to "desegregate" the school through affirmative action.

The reliance upon *Fordice* is misplaced, however. The district court held that *Fordice*'s mandate to schools "to eliminate every vestige of racial segregation and discrimination" made *Croson* inapplicable, 861 F. Supp. at 571, and reasoned that this mandate includes the effects of such prior practices or policies.

Fordice does not overrule *Croson*. The central holding of *Fordice* is that a state or one of its subdivisions must act to repudiate the continuing "policies or practices" of discrimination. 505 U.S. at 731-32, 112 S. Ct. at

2737-38.[48] In other words, a state has an affirmative duty to remove policies, tied to the past, by which it continues to discriminate. The *Fordice* Court did not address, in any way, a state actor's duty to counter the present effects of past discrimination that it did not cause.[49]

In sum, the law school has failed to show a compelling state interest in remedying the present effects of past discrimination sufficient to maintain the use of race in its admissions system. Accordingly, it is

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[48]In more detail, the *Fordice* Court said the following:

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects--whether by influencing student enrollment or by fostering segregation in other facets of the university system--and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.

505 U.S. at 731, 112 S. Ct. at 2737.

[49]In *Croson*, Justice O'Connor did argue that a state may act to prevent its powers from being used to support private discrimination. 488 U.S. at 491-92, 109 S. Ct. at 720-21 (plurality opinion) ("[A] state or local subdivision, (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.") (emphasis added). Hence, a specific state actor can act to prevent the state from being used as a "passive participant" in private discrimination. This power does not create wide-ranging authority to remedy societal discrimination, however.

unnecessary for us to examine the district court's determination that the law school's admissions program was not narrowly tailored to meet the compelling interests that the district court erroneously perceived.[50]

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[50]The plaintiffs argue that indeed there is no narrow tailoring, for at least the following reasons: (1) In 1992, more than two-thirds of all admission offers to blacks, and a majority of all blacks who matriculated, involved out-of-state residents, thus undercutting the law school's stated purpose of remedying past discrimination in Texas. (2) The system of preferences has no termination date, thus indicating that there is no connection between the plan and a bona fide remedial purpose. (3) Preference is given even to blacks and Mexican Americans who graduated from private secondary schools and thus did not suffer from state-ordered racial discrimination.

The law school apparently chose admission goals of 5% blacks and 10% Mexican Americans because those are the respective percentages of college graduates in Texas who are black and Mexican American. Nothing in the record, however, establishes any probative correlation between the degree of past discrimination and the percentage of students from a minority group who graduate from college.

There is no history either of *de jure* discrimination against Mexican Americans in education at any level in Texas or of *de facto* discrimination against Mexican Americans by the law school. Therefore, it is puzzling that the law school would set an admissions goal for Mexican Americans that is twice that of blacks, as to whom the history of *de jure* discrimination in Texas Education in general, and by the law school in particular, is irrefutable.

If fashioning a remedy for past discrimination is the goal, one would intuit that the minority group that has experienced the most discrimination would have the lowest

IV.

While the district court declared the admissions program unconstitutional, it granted the plaintiffs only limited relief. They had requested injunctive relief ordering that they be admitted to law school, compensatory and punitive damages, and prospective injunctive relief preventing the school from using race as a factor in admissions.

A.

We must decide who bears the burden of proof on the damages issue. The district court refused to order the plaintiffs' admission (or award any compensatory damages), as it found that they had not met their burden of persuasion in attempting to show that they would have been admitted absent the unconstitutional system. 861 F. Supp. at 579-82.[51] The law school now argues that the plaintiffs had the burden of persuasion on the issue of damages and that the district court's findings are not clearly erroneous.[52] The plaintiffs maintain, as they did

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college graduation rate and therefore would be entitled to the most benefit from the designed remedy. The goals established by the law school are precisely the reverse of that intuitive expectation and are more reflective of a goal of diversity (which we hold is not compelling) than of a goal of remedying past discrimination.

[51]This finding also affected the court's analysis in denying prospective relief and compensatory damages.

[52]The district court applied a burden-shifting scheme similar to the methodology used in the title VII context. 861 F. Supp.

in the district court, that once they had shown a constitutional violation, the burden of persuasion shifted to the school to show that the denial of admission was not caused by that violation.

The well-established rule is that in order to collect money damages, plaintiffs must prove that they have been injured. *Carey v. Piphus*, 435 U.S. 247, 254-57, 98 S. Ct. 1042, 1047-49, 55 L. Ed. 2d 252 (1978). Several Supreme Court cases, however, allow for a transfer of burden upon proof of discrimination. *See Mt. Healthy City Sch., Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284, 97 S. Ct. 568, 574-75, 50 L. Ed. 2d 471 (1977); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66, 97 S. Ct. 555, 563-64, 50 L. Ed. 2d 450 (1977).[53]

In *Mt. Healthy*, a discharged school teacher sued for reinstatement, claiming his termination was a result of comments he had made on a radio show, a violation of his First and Fourteenth Amendment rights. The Court devised a test of "causation" that placed the burden of proving no harm on the defendant:

> Initially, . . . the burden was properly placed upon

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at 579-80 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)). The law school concedes that the burden-shifting exercise was unnecessary, but it maintains nonetheless that the "ultimate burden of proof," including proof of damages, rests upon the plaintiffs. *See id.*

[53]Some of Justice Powell's *dicta* in *Bakke* also squarely supports the plaintiffs' claim that once discrimination is proved, the defendant bears the burden of proving no damage. *Bakke*, 438 U.S. at 320, 98 S. Ct. at 2763-64 (opinion of Powell, J.).

> the respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to the respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287, 97 S. Ct. at 576. In *Arlington Heights*, the Court applied a similar rule where the decision of a zoning board was challenged as racially discriminatory. *See* 429 U.S. at 270 n.21, 97 S. Ct. at 566 n.21. In sum, these cases allow a defendant, who intended to discriminate or otherwise act unconstitutionally, to show that its action would have occurred regardless of that intent.

Courts are split on whether the *Mt. Healthy* rubric applies in racial preference cases.[54] We conclude that

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[54]*Compare Henson v. University of Ark.*, 519 F.2d 576, 577-78 (8th Cir.1975) (per curiam) (placing burden of persuasion on white applicant to show affirmative action program prevented her admission) and *Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475 F. Supp. 1318, 1345 (W.D.N.C. 1979) (holding that plaintiff in non-class action bears burden of proving damages) with *Donnelly v. Boston College*, 558 F.2d 634, 635 (1st Cir. 1977) (*dictum*) (citing *Bakke* and *Mt. Healthy*, but finding no causation, as evidence showed that plaintiff would not have been admitted regardless of affirmative action) and *Heit v. Bugbee*, 494 F. Supp. 66, 66-67 (E.D. Mich. 1980) (adopting

the *Mt. Healthy* methodology is appropriate in the instant case. The *Mt. Healthy* plaintiff, like the present plaintiffs, brought a constitutional challenge, and his injuries were analogous to the injuries alleged here. As we have said, the title VII burden-shifting scheme is designed to determine whether a violation of law has occurred.

In this case, there is no question that a constitutional violation has occurred (as the district court found) and that the plaintiffs were harmed thereby. *See Adarand*, ___ U.S. at ___, 115 S. Ct. at 2105 ("The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' ") (citation omitted). The *Mt. Healthy* burden-shifting exercise simply gives the defendant law school a second chance of prevailing by showing that the violation was largely harmless.

As the district court held, to the contrary, that plaintiffs had the burden, it should revisit this issue in light of what we have said in both the liability and remedial portions of this opinion.[55] In the event that the

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Bakke and *Mt. Healthy* reasoning *in toto* for firefighter's reverse discrimination claims) and *United States v. McDonald*, 553 F. Supp. 1003, 1006 (S.D. Tex. 1983) (*dictum*) (same for discriminatory criminal prosecution).

[55]The district court concluded that the plaintiffs proved only that they had been denied equal treatment but had failed to "prove an injury-in-fact." 861 F. Supp. at 582. To the extent that the court felt that plaintiffs failed to show injury-in-fact because they failed to prove that they would have been admitted under a constitutional admissions system, this conclusion should be revisited on remand, where the district

law school is unable to show (by a preponderance of the evidence) that a respective plaintiff would not have been admitted to the law school under a constitutional admissions system, the court is to award to that plaintiff any equitable and/or monetary relief it deems appropriate.

Obviously, if the school proves that a plaintiff would not have gained admittance to the law school under a race-blind system, that plaintiff would not be entitled to an injunction admitting him to the school. On the other hand, the law school's inability to establish a plaintiff's non-admission--if that occurs on remand--opens a panoply of potential relief, depending in part upon what course that plaintiff's career has taken since trial in mid-1994. It then would be up to the district court, in its able discretion, to decide whether money damages[56] can substitute for an order of immediate admission--relief that would ring hollow for a plaintiff for whom an education at the law school now is of little or no benefit.[57]

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court must apply the proper burden and redetermine whether plaintiffs would have been admitted.

[56]We do not opine on any Eleventh Amendment immunity in this case. *See, e.g., United Carolina Bank v. Board of Regents*, 665 F.2d 553, 561 (5th Cir. Unit A 1982) (holding that the Eleventh Amendment barred a civil rights suit brought by a professor against university officials in their official capacities). This issue is simply not before us.

[57]For example, if the school is unable to show that plaintiff Carvell would not have gained admission even under a constitutional admissions system, he may be entitled to be compensated for the difference, to which he testified, between tuition at the law school and tuition at Southern Methodist

Additionally, the district court erred in holding that plaintiffs did not prove that defendants had committed intentional discrimination under title VI. "Intentional discrimination," as used in this context, means that a plaintiff must prove "that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on the basis of race." *Castaneda v. Pickard*, 648 F.2d 989, 1000 (5th Cir. Unit A June 1981); *see also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983). While we agree with the district court's conclusion that the various defendants acted in good faith, there is no question that they intended to treat the plaintiffs differently on account of their race.

B.

The plaintiffs argue that, because they proved a constitutional violation, and further violations were likely to result, the district court erred in denying them

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University School of Law, which he attended instead. The district court should also consider the following paradox: The law school argued strenuously that plaintiff Elliott did not have standing to sue, as he had been offered admission to the school--albeit at the last moment--and had failed to accept that offer. The district court found that this offer of admission had not been communicated to Elliott. 861 F. Supp. at 566. In considering damages, however, the court held that "in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process." *Id.* at 581. The district court should re-examine these contradictory results.

prospective injunctive relief. We review denials of this sort of relief for an abuse of discretion. *See, e.g., Peaches Entertainment Corp. v. Entertainment Repertoire Associates*, 62 F.3d 690, 693 (5th Cir. 1995). The law school avers that the district court was well within its equitable discretion in denying relief, especially as the school had abandoned the practices that the district court had found were unconstitutional--to-wit, the use of separate admissions committees for whites and minorities.

We review denials of prospective injunctive relief as we would any other denial of permanent injunctive relief under FED. R. CIV. P. 65, keeping in mind, however, the questions of mootness, ripeness, and standing. *See generally* 11A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2942 (2d ed. 1995). That treatise notes that

> [p]erhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the court's discretion. Of course, in some situations the facts and relevant law may indicate that an injunction clearly should be granted or denied. However, in most cases the determination whether to issue an injunction involves a balancing of interests of the parties who might be affected by the court's decision--the hardship on the plaintiff if relief is denied as compared to the defendant if relief is granted and the extent to which the latter hardship can be mitigated by requiring a security bond. Not surprisingly, therefore, the court's decision depends on the circumstances of each case.

Id. at 41-42. Accordingly, the usual practice upon reversal of a denial of injunctive relief is to remand for a reweighing of the equities. *Id.* § 2962, at 448; *See, e.g., James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354-55 (5th Cir. 1977). In other situations, the appellate court may order the district court to enter an injunction. *See, e.g., Southeastern Promotions, Ltd. v. City of Mobile*, 457 F.2d 340 (5th Cir. 1972).

According to the district court, the school had abandoned the admissions procedure--consisting of the separate minority subcommittee--that was used in 1992, 1993, and 1994. The court reasoned that, as a new procedure was developed for 1995, a prospective injunction against the school was inappropriate. We conclude, however, that, while the district court may have been correct in deciding that the new procedure eliminates the constitutional flaws that the district court identified in the 1992 system, there is no indication that the new system will cure the additional constitutional defects we now have explained.

The new system utilizes a small "administrative admissions group" and does not use presumptive admission and denial scores. *See Hopwood*, 861 F. Supp. at 582 n.87. Most significantly, there is no indication that in employing the new plan, the law school will cease to consider race per se in making its admissions decisions. To the contrary, as the district court recognized, the law school continues to assert that overt racial preferences are necessary to the attainment of its goals. *See Hopwood*, 861 F. Supp. at 573-75.

The district court has already granted some equitable relief: It directed that the plaintiffs be

permitted to re-apply to the law school without incurring further administrative costs. In accordance with this opinion, the plaintiffs are entitled to apply under a system of admissions that will not discriminate against anyone on the basis of race. Moreover, the plaintiffs have shown that it is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction to the effect that it may not do so for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.

It is not necessary, however, for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion. If an injunction should be needed in the future, the district court, in its discretion, can consider its parameters without our assistance. Accordingly, we leave intact that court's refusal to enter an injunction.

C.

The plaintiffs contend that the district court's application of the wrong standard causes it to deny punitive damages. The plaintiffs aver that the court applied an animus standard, when it should have asked whether the school acted with "reckless indifference" to their constitutional rights. They ask for a remand on this issue.

It is not apparent, from the record, what standard the district court applied in considering the punitive damages issue. The court did determine, however, that

the law school had always acted in good faith. This is a difficult area of the law, in which the law school erred with the best of intentions. As a result, the plaintiffs have not met the federal standard for punitive damages as stated in *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632 (1983). Thus, we agree with the district court that punitive damages are not warranted. We note, however, that if the law school continues to operate a disguised or overt racial classification system in the future, its actors could be subject to actual and punitive damages.

V.

Consolidated with the appeal of the merits issues of this appeal is No. 94-50569, challenging the district court's denial of a motion to intervene. The proposed intervenors--the Thurgood Marshall Legal Society and the Black Pre-Law Association (the "associations")--ask this court, for the second time, for the right to intervene. On their first attempt, the associations moved to intervene prior to trial either as of right or by permission. The district court denied intervention, and we affirmed. *See Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994) (per curiam) ("*Hopwood I*").

Now, following the trial, the associations believe they can show that the law school has failed to assert one of their proposed defenses, a circumstance they contend establishes their right to intervene. We apply the law of the case doctrine and dismiss No. 94-50569 for want of jurisdiction.

A.

The proposed intervenors are black student organizations at the University of Texas at Austin and its law school that, just prior to the trial of the merits appeal, sought to intervene, arguing that the law school would not effectively protect their interests in continuing racial preferences at the law school. The district court denied the proposed intervention on the ground that the law school and the two associations had the same objective: preservation of the status quo.

On expedited appeal, this court affirmed on the ground that the associations had failed to show that the law school had an interest different from theirs. We also commented that the two groups had failed to show "a separate defense of the affirmative action plan that the State has failed to assert." *Id.* at 606. The panel implicitly considered and rejected, as one potential divergence of interests, the possibility that the law school would not raise a defense based upon the legality of the use of TI scores under title VI, as the associations argued that possibility as one basis for intervention.

After their first motion to intervene was denied, the associations remained involved in the case. Throughout the course of the trial, they acted as *amici curiae*. And, at the close of trial but before judgment, the district court intimated that it would allow them to submit information for the record. Accordingly, the associations sought to introduce testimonial and documentary evidence supporting their arguments that (1) the TI by itself was an unlawful basis for admissions decisions under title VI and (2) that affirmative action at the university was constitutionally required. The plaintiffs opposed the

introduction of evidence on these "new defenses," and the district court agreed. The associations were allowed to submit *amicus* briefs and highlight evidence that was already in the record but were not allowed to raise new issues or supplement the record.

Shortly thereafter, the associations again sought to intervene under FED. R. CIV. P. 24(a)(2) (intervention as of right), claiming that the law school had failed to raise their two "new defenses" and, accordingly, that events now showed that that representation inadequately protected their interests. They sought to reopen the record to introduce evidence supporting these arguments.

The district court summarily refused this request. That order is the focus of this separate appeal, in which the associations present only the title VI defense and ask to be allowed to present such evidence only if we do not affirm the judgment.

B.

There is no caselaw in this circuit that directly addresses how to review successive motions to intervene.[58] The parties direct us to *Hodgson v. United*

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[58]There is circuit law regarding successive motions, but the pertinent opinions do not examine the standard of review explicitly. *See, e.g., Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285 (5th Cir.) (implicit application of *de novo* review without discussion of standard), *cert. denied*, 484 U.S. 817, 108 S. Ct. 72, 98 L. Ed. 2d 35 (1987); *United States v. Louisiana*, 669 F.2d 314, 315 (5th Cir. 1982) (application of abuse of discretion review for timeliness determination on second motion where proposed intervenor failed to argue for

Mine Workers, 473 F.2d 118, 125-26 (D.C. Cir. 1972); *United States Envt'l Protection Agency v. City of Green Forest*, 921 F.2d 1394, 1401 (8th Cir. 1990), *cert. denied*, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991); and *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1477 (11th Cir. 1993). These courts, which were examining whether the appeal from a successive motion was timely as per the appellate requirements, devised the general rule that a second motion would be treated as independent of the first if it was reached under materially changed circumstances.

Here, the associations assume that their second intervention motion is separate and distinct from their earlier failed attempt, because the law school's failure to raise their proposed defense constitutes a changed circumstance.[59] Thus, they ask that we engage in de

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first motion after remand); *Calvert Fire Ins. Co. v. Environs Dev. Corp.*, 601 F.2d 851, 857 (5th Cir. 1979) (implicit application of *de novo* review where district court treated second motion as both a reconsideration of prior motion and a new motion).

[59]The associations ground this argument in language taken from the prior appeal. One necessary element for intervention is a showing that the present parties will inadequately represent the proposed intervenors' interests. While the associations lost on this ground on the last appeal, they now claim that the opinion supports the argument that the law school's defense is inadequate. In the last appeal, we cited *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990), as support for the following statement: "Nor have the proposed intervenors shown that they have a separate defense of the affirmative action plan that the State has failed to assert." *Hopwood I*, 21 F.3d at 606. Because the law school, now after trial, still has

novo review of their motion.

The plaintiffs, however, note that this motion was entitled a "renewed motion for intervention." The plaintiffs argue that the district court was reconsidering its previous denial order under its FED. R. CIV. P. 60(b) powers, and we should review merely for abuse of discretion.

C.

While the "changed circumstances" test may have merit--an issue we do not decide today--we do not find it applicable to this case. Instead, the "law of the case" doctrine militates against reconsideration of this motion. Normally, when a prior panel discusses an issue on the merits, a later panel cannot reach a contrary conclusion under the preclusive principle of law of the case. *See Williams v. City of New Orleans*, 763 F.2d 667, 669 (5th Cir. 1985). There is no question that the *Hopwood I* panel addressed the intervention as a matter of right *de novo*, on the merits, including the potential that the law

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not asserted the associations' title VI defense, the associations maintain that they now can meet their burden.

In *Jansen*, however, the court found that the proposed intervenors had an interest different from that of the defendant city. 904 F.2d at 343. This was the basis for that court's holding that the city's representation was inadequate. *See id.* ("Proffering this alleged violation of the consent decree as an affirmative defense is directly counter to the City's interest.") (emphasis added). Here, we have already found that the law school's and the associations' interests are the same. *Jansen* therefore does not support intervention.

school would not raise every defense proposed by the associations.

The question of whether we can rely upon the law of the case doctrine, however, is clouded because of the "anomalous" rule that exists in this circuit concerning the procedural posture of these intervention cases. Under that rule, we have only provisional jurisdiction to review a district court's denial of a motion to intervene.

If we agree with the district court, our jurisdiction "evaporates." Hence, the denial of leave to intervene when the party had a right to intervene is immediately appealable. On appeal, however, our rule "requires a merit review of any claim of intervention in order for [us] to determine whether or not the district court's order is appealable." *Weiser v. White*, 505 F.2d 912, 916 (5th Cir. 1975). If the claim is without merit, then the order "is not appealable, the appellate court has no jurisdiction, and the appeal should be dismissed." *Id.* Thus, despite the merits review, this is a dismissal for want of jurisdiction.[60]

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[60]At least one set of commentators has eschewed this traditional rule. Their position is that "[a]ny denial of intervention should be regarded as an appealable final order." 7C CHARLES A. WRIGHT, ARTHUR MILLER & MARY KAY KANE, *supra*, § 1923, at 508. Under this proposed rule, the federal court would "affirm denial of intervention when previously, having determined on the merits that the trial court was right, it would dismiss the appeal." *Id.* at 509. We have acknowledged that this would be the better rule. *See Korioth v. Briscoe*, 523 F.2d 1271, 1279 n.26 (5th Cir. 1975) (citing Charles A. Wright, Arthur Miller & Mary Kay Kane, *supra*). In fact, the *Hopwood I* panel affirmed rather than dismissing for want of jurisdiction. Under the suggested rule, because we

Our anomalous rule complicates the analysis of the preclusive effects of the prior panel decision, because dismissals for lack of jurisdiction normally do not have preclusive effect. See, e.g., FED. R. CIV. P. 41(b). Accordingly, while appellate courts review denials of intervention motions on the merits, it is uncertain to what extent such a review has preclusive effect. Nonetheless, we recognize the possibility of issue preclusion on the question of jurisdiction itself.

While a dismissal for lack of jurisdiction does not operate as an adjudication on the merits, "[t]his provision means only that the dismissal permits a second action on the same claim that corrects the deficiency found in the first actior The judgment remains effective to preclude relitigation of the precise issue of jurisdiction or venue that led to the initial dismissal." 7C CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER *supra*, § 4436, at 338.[61] Thus, a party is precluded from successively appealing the same intervention motion.

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[61]A dismissal for want of jurisdiction, however, leaves open the possibility that the deficiency can be cured. If that occurs, no issue preclusion exists. *See* 7C CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *supra*, § 4436, at 338. It is at this point in the analysis that "changed circumstances" may become relevant. Arguably, the "changed circumstances" analysis, in effect, "cures" the earlier jurisdictional deficiency. Thus, if the circumstances of the case change to such an extent that jurisdiction would lie, the subsequent motion to intervene should not be dismissed for lack of jurisdiction. In effect, the posture of the case has changed, as it would any time a given jurisdictional problem is cured.

Here, the record shows that the associations raised this same title VI argument before the *Hopwood I* panel in both their brief and at oral argument. That panel, reviewing *de novo* the merits of the associations' claims, denied intervention. Accordingly, the last panel implicitly addressed this issue, and we must respect its decision to deny intervention. The law of the case doctrine prevents merits review, and we dismiss No. 94-50569 for want of jurisdiction.[62]

VI.

In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law

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[62]In *Hopwood I*, we decided that (1) the interests of the associations were adequately represented by the law school and the state, and (2) as a practical matter, disposition in the principal suit would not impair or impede either of those groups' interests. 21 F.3d at 605. The law of the case doctrine militates against revisiting that decision here. For purposes of any future litigation, however, we note a necessary effect of our previous holding when coupled with the law school's failure to raise a title VI argument: Neither the district court's decision nor ours in this appeal is binding on the associations as res judicata, law of the case, collateral estoppel, or any other theoretical bar.

In short, as the title VI issue has not been litigated, the associations are not precluded from instituting a separate and independent title VI challenge to the law school's use of the TI. We neither express nor imply an opinion on the viability of such a challenge.

school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school. Because the law school has proffered these justifications for its use of race in admissions, the plaintiffs have satisfied their burden of showing that they were scrutinized under an unconstitutional admissions system. The plaintiffs are entitled to reapply under an admissions system that invokes none of these serious constitutional infirmities. We also direct the district court to reconsider the question of damages, and we conclude that the proposed intervenors properly were denied intervention.

In No. 94-50569, the appeal is DISMISSED for want of jurisdiction. In No. 94-50664, the judgment is REVERSED and REMANDED for further proceedings in accordance with this opinion.

WIENER, Circuit Judge, specially concurring.

"We judge best when we judge least, particularly in controversial matters of high public interest."[1] In this and every other appeal, we should decide only the case before us, and should do so on the narrowest possible basis. Mindful of this credo, I concur in part and, with respect, specially concur in part.

The sole substantive issue in this appeal is whether the admissions process employed by the law school for 1992 meets muster under the Equal Protection Clause of

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[1] *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 931 (5th Cir. 1993) (Wiener, J., dissenting).

the Fourteenth Amendment. The law school offers alternative justifications for its race-based admissions process, each of which, it insists, is a compelling interest: (1) remedying the present effects of past discrimination (present effects) and (2) providing the educational benefits that can be obtained only when the student body is diverse (diversity).[2]

As to present effects, I concur in the panel opinion's analysis: Irrespective of whether the law school or the University of Texas system as a whole is deemed the relevant governmental unit to be tested,[3] neither has established the existence of present effects of past discrimination sufficient to justify the use of a racial classification.[4] As to diversity, however, I respectfully disagree with the panel opinion's conclusion that diversity can never be a compelling governmental interest in a public graduate school. Rather than attempt to decide that issue, I would take a considerably narrower path--and, I believe, a more appropriate one--to reach an equally narrow result: I would assume arguendo that diversity can be a compelling interest but conclude that the admissions process here under scrutiny was not narrowly tailored to achieve diversity.

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[2]*See Hopwood v. State of Tex.*, 861 F. Supp. 551, 570 (W.D. Tex. 1994).

[3]I agree with the panel opinion that the defendants are overreaching when they urge that the State of Texas or its primary and secondary school system should be the relevant governmental unit.

[4]Panel Opn. at 43 & n. 44.

I.

THE LAW

A. EQUAL PROTECTION

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[5] Accordingly, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[6] [FN6] Racial classifications will survive strict scrutiny "only if they are narrowly tailored measures that further compelling governmental interests."[7] Thus, strict scrutiny comprises two inquiries of equal valence: the "compelling interest" inquiry and the "narrow tailoring" inquiry.[8] Moreover, these inquiries are conjunctive: To avoid constitutional nullity, a racial classification must satisfy *both* inquiries. Failure to satisfy either is fatal.

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[5]U.S. Const., amend. 14, § 1.

[6]*Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, ___, 115 S. Ct. 2097, 2115, 132 L. Ed. 2d 158 (1995) (emphasis added).

[7]*Id.*

[8]*See id.* at ___, 115 S. Ct. at 2117. ("Racial classifications . . . *must* serve a compelling governmental interest and *must* be narrowly tailored to further that interest.") (emphasis added); *see also Miller v. Johnson*, ___ U.S. ___, ___, 115 S. Ct. 2475, 2490, 132 L. Ed. 2d 762 (1995) ("To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling governmental interest.").

B. RACIAL CLASSIFICATION

None dispute that the law school's admission process for 1992 employed a racial classification. Depending on an applicant's race, his request for admission was considered under one of three different (and, as explained in the panel opinion, often dispositive[9]) TI admission ranges: one for blacks only, a second for Mexican Americans only, and a third for all other races and nationalities, including non-Mexican Hispanic Americans. In short, each applicant for admission to the law school was classified by race, and his application was treated differently according into which of those three racial classifications it fell. Thus, the law school's 1992 admissions process, like all racial classifications by the government, is subject to strict scrutiny.[10]

C. STRICT SCRUTINY

The law school contends that it employs a racially stratified admissions process to obtain, *inter alia*, the educational benefits of a diverse student body. Translated into the constitutional idiom, the law school insists that achieving student body diversity in a public graduate school is a compelling governmental interest. The law school invokes the opinion of Justice Powell in *Regents of*

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[9]*See* Panel Opn. at 6-7 (explaining that a Mexican American or a black applicant with a TI of 189 is presumptively admitted, while an "other race" applicant with an identical TI is presumptively denied).

[10]*Adarand*, ___ U.S. at ___, 115 S. Ct. at 2115.

the University of California v. Bakke[11] to support that postulate. The panel opinion rejects that support, concluding that from its inception *Bakke* had little precedential value and now, post-*Adarand*, has none. My fellow panelists thus declare categorically that "any consideration of race or ethnicity by the law school for the purposes of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."[12]

This conclusion may well be a defensible extension of recent Supreme Court precedent, an extension which in time may prove to be the Court's position. It admittedly has a simplifying appeal as an easily applied, bright-line rule proscribing any use of race as a determinant. Be that as it may, this position remains an extension of the law--one that, in my opinion, is both overly broad and unnecessary to the disposition of this case. I am therefore unable to concur in the majority's analysis.

My decision not to embrace the ratio decidendi of the majority opinion results from three premises: First, if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that

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[11]438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). Justice Powell opens his discussion of equal protection and diversity in *Bakke* by stating that the "attainment of a diverse student body . . . clearly [is] a constitutionally permissible goal for an institution of higher education," *id.* at 311-12, 98 S. Ct. at 2759-60, and, in the unique context of institutions of higher learning, he concludes that diversity is a compelling interest. *Id.* at 312, 98 S. Ct. at 2759-60.

[12]Panel Opn. at 25 (emphasis added).

pronouncement. Second, Justice O'Connor expressly states that *Adarand* is not the death knell of affirmative action--to which I would add, especially not in the framework of achieving diversity in public graduate schools.[13] Third, we have no need to decide the thornier issue of compelling interest, as the narrowly tailored inquiry of strict scrutiny presents a more surgical and--it seems to me--more principled way to decide the case before us.[14] I am nevertheless reluctant to proceed with a narrowly tailored inquiry without pausing to respond briefly to the panel opinion's treatment of diversity in the context of the compelling interest inquiry.

D. IS DIVERSITY A COMPELLING INTEREST?

Along its path to a per se ban on any consideration of race in attempting to achieve student body diversity, the panel opinion holds (or strongly implies) that remedying vestigial effects of past discrimination is the only compelling interest that can ever justify racial

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[13]*Adarand*, ___ U.S. at ___, 115 S.Ct. at 2117 ("When race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

[14]*See, e.g., Rust v. Sullivan*, 500 U.S. 173, 224, 111 S. Ct. 1759, 1788, 114 L. Ed. 2d 233 (1991) (O'Connor, J. dissenting) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them.") (citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157, 104 S. Ct. 2267, 2279, 81 L. Ed. 2d 113 (1984)).

classification.[15] The main reason that I cannot go along with the panel opinion to that extent is that I do not read the applicable Supreme Court precedent as having held squarely and unequivocally either that remedying effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest. Indeed, the panel opinion itself hedges a bit on whether the Supreme Court's square holdings have gone that far,[16] particularly in the realm of higher education.[17]

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[15]Panel Opn. at 26-29.

[16]The Court *appears* to have decided that "there is *essentially* only one compelling state interest to justify racial classification: remedying past wrongs." Panel opn. at 27 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 721-22, 102 L. Ed. 2d 854 (1989) (plurality opinion) (emphasis added)).

[17]Panel Opn. at 28 n. 27, (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286, 106 S. Ct. 1842, 1853, 90 L. Ed. 2d 260 (1986) (O'Connor, J. concurring in part and concurring in the judgment)). ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found to be sufficiently 'compelling' at least in the context of higher education to support the use of racial considerations in furthering that interest.").

Between the difficulty inherent in applying *Bakke*[18] and the minimal guidance in *Adarand*,[19] the

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[18]I readily concede that problems are encountered when efforts are made to apply the Supreme Court's *Bakke* decision. Panel Opn. at 20, 25, & 26 (respectively pointing out that (1) *Bakke* comprises multiple opinions and divergent analyses, (2) no Justice, other than Justice Powell, discusses diversity, and (3) *Bakke* is questioned in *Adarand*). The panel opinion fails to describe this last problem with precise accuracy. That opinion's expurgated version of the quotation at 26, lines 736-42 makes it appear as though the *Adarand* majority questioned *Bakke*. In full, the sentence reads "[the Court's] failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action." Thus, although the Court acknowledges that *Bakke* et al. left things unresolved, I do not read this quotation, (as the panel opinion suggests) as an order to throw out *Bakke*--bath water, baby, and all.

Nevertheless, the fractured nature of *Bakke*'s holding has left more questions than answers in its wake. As observed in the instant panel opinion, there has been "no [other] indication from the Supreme Court, . . . [whether] the state's interest in diversity [in higher education] constitutes a compelling justification for governmental race-based classifications." Panel Opn. at 28. I agree that *Bakke* is the only indication that diversity is a compelling interest. But, unlike the panel opinion, which jettisons Justice Powell's *Bakke* opinion because of its singularity, I find that singularity to be precisely the factor that makes Justice Powell's opinion the most pertinent Supreme Court statement on this issue. Therefore, when and if the Supreme Court addresses this case or its analog, the Court will have no choice but to go with, over, around, or through Justice Powell's *Bakke* opinion. By assuming, as I do, that diversity is a compelling interest, however, these problems are avoided altogether.

definition and application of the compelling interest inquiry seems to be suspended somewhere in the interstices of constitutional interpretation. Until further clarification issues from the Supreme Court defining "compelling interest" (or telling us how to know one when we see one), I perceive no "compelling" reason to rush in where the Supreme Court fears--or at least declines--to tread. Instead, I would pretermit any attempt at a compelling interest inquiry and accept Justice O'Connor's invitation to apply the Court's more discernible and less

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[19]Recently, in *Adarand* the Supreme Court stated that it had "altered the [equal protection] playing field in some important respects." ___ U.S. at ___, 115 S. Ct. at 2118. In her opinion for the majority, however, Justice O'Connor repeatedly emphasizes that *Adarand* did not drive a stake through the heart of affirmative action. To the contrary, she emphatically states, "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " *Id.* at ___, 115 S. Ct. at 2117 (quoting *Fullilove*, 448 U.S. 448, 519, 100 S. Ct. 2758, 2795, 65 L. Ed. 2d 902 (Marshall, J., concurring in judgment)). Moreover, "[w]hen race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." *Id.*

It seems to me that as a practical matter, *Adarand* resolves very little. In fact, the much heralded change is quite limited: Race-based classifications, imposed by the *federal* government, are now subject to strict scrutiny. Curiously (or perhaps not so curiously given the enigmatic difficulty of the task), the Supreme Court declined to define compelling interest or to tell us how to apply that term. Indeed, the Court did not even decide the case before it, opting instead to remand the case for further adjudication.

intrusive "narrow tailoring" precedent.[20] Thus, for the purpose of this appeal I assume, without deciding, that diversity is a compelling interest,[21] and proceed to the

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[20]*Id.* ("[W]hen race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

[21]Although I assume without deciding that diversity is a compelling interest, if I had no choice but to address compelling interest I would do so in the *context* in which the issue is presented, i.e., the constitutionally permissible means of constructing an entering a class at a public graduate or professional school. This unique context, first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the redistricting context; it comprises only the public higher education context and implicates the uneasy marriage of the First and Fourteenth Amendments. *See Bakke*, 438 U.S. at 311-12, 98 S. Ct. at 2759-60. Consequently, we play with fire when we assume an easy crossover of Fourteenth Amendment maxims pronounced in cases decided in such other contexts.

The panel opinion concludes that this contextual distinction is unimportant, holding that, whatever the context, remedying the past effects of discrimination is the only compelling interest that can justify a racial classification. Panel Opn. at 26-29. That opinion acknowledges, however, that Supreme Court precedent does not go this far: namely, the higher education context is different. Indeed the panel opinion quotes Justice O'Connor's words expressly stating that higher education is different. Panel Opn. at 28 n. 27 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286, 106 S. Ct. 1842, 1853, 90 L. Ed. 2d 260 (1986) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found to be sufficiently 'compelling' at least

narrowly tailored inquiry.

E. TEST FOR NARROW TAILORING

When strictly scrutinizing a racial classification for narrow tailoring, the first question is "What is the purpose of this racial classification?"[22] The present effects rationale having proven feckless in this case, today's answer to that first question is a given: The law school's purpose is diversity. Accordingly, I perceive the next question to be, "Was the law school's 1992 admissions process, with one TI range for blacks, another for Mexican Americans, and a third for other races, narrowly tailored to achieve diversity?" I conclude that it was not. Focusing as it does on blacks and Mexican Americans only, the law school's 1992 admissions process misconceived the concept of diversity, as did California's in the view of Justice Powell: Diversity which furthers a compelling state interest "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[23]

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in the context of higher education to support the use of racial considerations in furthering that interest.")).

[22]*United States v. Paradise*, 480 U.S. 149, 171, 107 S. Ct. 1053, 1066-67, 94 L. Ed. 2d 203 (1987).

[23]*Bakke*, 438 U.S. at 316, 98 S. Ct. at 2761-62. In the portion of his opinion that addresses narrow tailoring, Justice Powell concluded that California's admission process misconceived the concept of "diversity." *Id.* California's preferential program, focused as it was solely on aiding minority applicants, was not necessary to attain diversity. *Id.*

When the selective race-based preferences of the law school's 1992 admissions process are evaluated under Justice Powell's broad, multi-faceted concept of diversity, that process fails to satisfy the requirements of the Constitution.[24] The law school purported to accomplish diversity by ensuring an increase in the numbers of only blacks and Mexican Americans in each incoming class to produce percentages--virtually indistinguishable from quotas--of approximately five and ten percent, respectively. Yet blacks and Mexican Americans are but two among any number of racial or ethnic groups that could and presumably should contribute to genuine diversity. By singling out only those two ethnic groups, the initial stage of the law school's 1992 admissions process ignored altogether non-Mexican Hispanic Americans, Asian Americans, and Native Americans, to name but a few.

In this light, the limited racial effects of the law school's preferential admissions process, targeting exclusively blacks and Mexican Americans, more closely

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[24]In the instant litigation, the law school created its own Catch-22 by advancing two putative compelling interests that ultimately proved to produce so much internal tension as to damage if not fatally wound each other. Under the banner of prior discrimination, Texas had no choice but to single out blacks and Mexican- Americans, for those two racial groups were the only ones of which there is any evidence whatsoever of de facto or de jure racial discrimination by the State of Texas in the history of its educational system. But, by favoring just those two groups and doing so with a virtual quota system for affirmative action in admissions, the law school estops itself from proving that its plan to achieve diversity is ingenuous, much less narrowly tailored.

resembles a set aside or quota system for those two disadvantaged minorities than it does an academic admissions program narrowly tailored to achieve true diversity. I concede that the law school's 1992 admissions process would increase the percentages of black faces and brown faces in that year's entering class. But facial diversity is not true diversity, and a system thus conceived and implemented simply is not narrowly tailored to achieve diversity.

Accordingly, I would find that the law school's race-based 1992 admissions process was not narrowly tailored to achieve diversity and hold it constitutionally invalid on that basis. By so doing I would avoid the largely uncharted waters of a compelling interest analysis. Although I join my colleagues of the panel in their holding that the law school's 1992 admissions process fails to pass strict scrutiny,[25] on the question of diversity I follow the solitary path of narrow tailoring rather than the primrose path of compelling interest to reach our common holding.

II

REMEDY

Before concluding, I am compelled to add a few words about the panel opinion's "commentary" regarding the remedy to be imposed by the district court on remand. Without employing the express language of injunction or affixing that label to its holding, the panel opinion's

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[25]I also concur in my colleagues' conclusion that intervention by the two black student organizations is not mandated, and do so for the same reasons.

discussion of the remedy on remand is "strongly suggestive" and has all of the substantive earmarks of an injunction:

> [The] plaintiffs have shown that it is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction to the effect that it may not do so for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.
>
> It is not necessary, however, for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion. If an injunction should be needed in the future, the district court, in its discretion, can consider its parameters without our assistance. Accordingly, we leave intact that court's refusal to enter an injunction.[26]

Essentially, the substance of the quoted portion of the panel opinion constitutes a de facto injunction--telling the district court precisely what to tell the law school that it can and can't do--albeit without the use of the word injunction. To me, if "it" has feathers, swims, waddles, and quacks like a duck, it is a duck; and I find such an

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[26]Panel Opn. at 59-60.

"un-injunction" inappropriate. If instead we were simply to reverse and remand on the violation issue, we would stop short of finding de novo that the law school had violated these four plaintiffs' equal protection rights. It seems unavoidable to me that until the district court determines that there has been a violation, a remedy cannot be fashioned and should not be the subject of appellate speculation.[27]

The district court denied the plaintiffs injunctive relief, but only after assigning the burden of proof to the wrong party.[28]

No member of this panel questions that, in the initial stanza of the burden-shifting minuet of *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*,[29] the plaintiffs met their burden. Once the plaintiffs did that, the burden should have shifted to the law school. Instead, the district court left it with the plaintiffs and concluded that they had failed to carry the ultimate burden. The district court's

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[27]*Hay v. Waldron*, 834 F.2d 481, 484 (5th Cir. 1987) (The law is well-settled that the grant or denial of injunctive relief rests in the sound discretion of the *district court*); *Lubbock Civ. Lib. Union v. Lubbock Ind. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir.1982), *cert. denied*, 459 U.S. 1155, 103 S. Ct. 800, 74 L. Ed. 2d 1003 (1983).

[28]Panel Opn. at 55 ("We conclude that the *Mt. Healthy* methodology is appropriate in the instant case."). On this point, I agree with the panel majority that the *Mt. Healthy* burden-shifting minuet should apply.

[29]429 U.S. 274, 284, 97 S. Ct. 568, 574-75, 50 L. Ed. 2d 471 (1977).

failure to shift the burden to the law school, and the conclusion of that court which followed, were errors. Accordingly, like my colleagues of the panel, I would remand the case to the district court with instructions to relieve the plaintiffs of the misplaced burden while affording the law school the opportunity to prove that the prima facie violation established by the plaintiffs was essentially harmless. But it seems clear to me that this is where our analysis should end. As a result, I depart from the "commentary" in the panel opinion regarding the precise elements of the remedy to be fashioned by the district court if it should conclude on remand that the law school shall have failed to bear its burden.

III

CONCLUSION

I end where I began: We should only decide the issues necessarily before this court, and then only on the narrowest bases upon which our decision can rest. This is not a class action; nothing is before us here save the claims of four individual plaintiffs. These four individual plaintiffs properly challenge only the admissions process employed by the law school in 1992--not the admissions process that was in place and employed in 1995, not the admissions process that is being employed in 1996, and not the admissions process to be applied in any future years. In sum, I would remand, and in the process I would take care not to eviscerate the discretion of the district court with excessive "commentary" or implicit directions on the precise nature of the remedy that must ensue. Rather, my remand would simply instruct the district court to apply the correct burden-shifting process articulated in *Mt. Healthy*, then see how the law school

deals with it. That way, if the *Mt. Healthy* application should demonstrate the need for a remedy, the district court would be free to fashion the appropriate relief--including injunctive if necessary--for those among the individual plaintiffs whose individual cases warrant it. For this court to do anything beyond that impresses me as overreaching. Thus I concur in the judgment of the panel opinion but, as to its conclusion on the issue of strict scrutiny and its gloss on the order of remand, I disagree for the reasons I have stated and therefore concur specially.

Cheryl J. HOPWOOD, et al.,
Plaintiffs-Appellees,
v.
STATE OF TEXAS, et al.,
Defendants-Appellees,
v.
THURGOOD MARSHALL LEGAL SOCIETY and
Black Pre-Law Association,
Movants-Appellants.

Douglas CARVELL, et al.,
Plaintiffs-Appellees,
v.
STATE OF TEXAS, et al.,
Defendants-Appellees,
v.
THURGOOD MARSHALL LEGAL SOCIETY, and
Black Pre-Law Association,
Movants-Appellants.

No. 94-50083.

United States Court of Appeals,
Fifth Circuit.

May 11, 1994.

Before POLITZ, Chief Judge, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

Appellants, Thurgood Marshall Legal Society (TMLS) and Black Pre-Law Association (BPLA) appeal

the order of the district court denying their motion to intervene in this action. We affirm.

I.

Since 1983, Texas has implemented an affirmative action policy in its higher education system, a component of which is a race conscious admissions policy for the University of Texas School of Law (Law School). On September 29, 1992, two unsuccessful white applicants to the Law School filed a lawsuit challenging the admissions policy as racially discriminatory.[1] Named as defendants were the State of Texas, the Board of Regents of the Texas State University System, the Law School, and a number of individuals in their official capacities. Although the parties commenced limited discovery, the parties' focus was a dispute over standing and ripeness. This dispute was finally resolved on October 28, 1993, when the district court denied defendants' motion for summary judgment on standing and ripeness grounds. On November 18, 1993, the district court set the following deadlines: March 11, 1994 for a final pretrial conference; April 1, 1994, for completion of discovery; April 15, 1994 for filing of a joint pretrial order.

On January 5, 1994, the TMLS and BPLA moved for intervention of right and permissive intervention. The proposed intervenors argued that they had an interest in the existing admissions policy and in the elimination of the vestiges of past discrimination in the Law School's admissions policy. The state defendants did not oppose

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[1]The lawsuit was brought under 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

intervention, but the plaintiffs did. Without conducting a hearing, the district court denied intervention of right, ruling that the state defendants adequately represented TMLS and BPLA's interests.

The district court also denied permissive intervention, reasoning that it would "needlessly increase cost and delay disposition of the litigation." TMLS and BPLA promptly appealed.

II.

In order to intervene as of right under FED. R. CIV. P. 24(a),[2] the proposed intervenor must demonstrate 1) that it has an interest in the subject matter of the action, 2) that disposition of the action may practically impair or impede the movant's ability to protect that interest, and 3) that the interest is not adequately represented by the existing parties. *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir.), *cert. denied*, 400 U.S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970). The application must also be timely under the circumstances. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977).

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[2]Rule 24(a) states that

> [U]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A. Adequacy of Representation

The district court held that BPLA and TMLS failed to demonstrate that the state did not adequately represent their interests. The district court reached this conclusion principally because the petitioners' ultimate objective was the same as the State's: to defend the affirmative action program.

The BPLA and TMLS contend that the State cannot adequately represent their interest because 1) the long history of discrimination against African-Americans by the State weighs against the State's willingness to vigorously represent the interests of the African-American students; 2) the State's interests are broader in that they must balance the interests of the African-American students against other students as well as balancing educational goals, fiscal responsibility, administrative concerns and public opinion; while the petitioners' only interest is in preserving an admissions policy that remedies the past effects of discrimination and fosters an atmosphere that is receptive to African-American students, and 3) the petitioners are in a better position to present evidence of recent discrimination.

The proposed intervenors have the burden of demonstrating inadequate representation. The Supreme Court held in 1972 that the burden is "minimal" and that the requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate . . ." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 636, 30 L. Ed. 2d 686 (1972). But where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required. *See* 7C CHARLES A. WRIGHT and

ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1909 (1986). In a suit involving a matter of sovereign interest, the State is presumed to represent the interests of all of its citizens. *New Orleans Public Service v. United Gas Pipe Line Co.*, 690 F.2d 1203, 1213 n.7 (5th Cir. 1982), *cert. denied*, 469 U.S. 1019, 105 S. Ct. 434, 83 L. Ed. 2d 360 (1984); *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). Because Texas is already a party, "the applicant for intervention must demonstrate that its interest is in fact different from that of the state and that the interest will not be represented by the state." *EDF* at 740. *See also, Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993).

The BPLA and TMLS argue that they have met their burden of showing that their interests are different from the State's. They contend that the State must balance competing goals while they are sharply focused on preserving the admissions policy. Moreover, they argue that because of its competing goals, the State is not in as good a position to bring in evidence of present effects of past discrimination and current discrimination.

In order to justify an affirmative action program, the State must show that there are "present effects of past discrimination." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986); *Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir. 1992). Although the BPLA and TMLS may have ready access to more evidence than the State, we see no reason they cannot provide this evidence to the State. The BPLA and the TMLS have been authorized to act as *amicus* and we see no indication that the State would not welcome their assistance. BPLA and TMLS have not met their burden

of demonstrating that they have a separate interest that the State will not adequately represent. The proposed intervenors have not demonstrated that the State will not strongly defend its affirmative action program. Nor have the proposed intervenors shown that they have a separate defense of the affirmative action plan that the State has failed to assert. *See, Jansen v. Cincinnati*, 904 F.2d 336 (6th Cir. 1990).

B. Permissive Intervention

In its January 1994 order, the district court also denied the prospective intervenors' motion to intervene pursuant to Rule 24(b), FED. R. CIV. P.[3] Specifically, Judge Sparks held that the proposed intervenors' interests were adequately being represented by the defendants in the case and that adding them to the lawsuit would needlessly increase costs and delay disposition of the litigation.

Intervention under Rule 24(b) is left to the sound discretion of the district court, and this court has jurisdiction only if the district court has abused its discretion. *E.g., Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 330 (5th Cir. 1982) ("the denial of a motion for

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[3]Rule 24(b) states that

> [U]pon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

permissive intervention under Rule 24(b) is not appealable unless there is an abuse of discretion").

As we have noted, we have never reversed a lower court's decision on Rule 24(b) intervention. *E.g.*, *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289-90 (5th Cir. 1987); *Doe v. Duncanville Independent School District*, 994 F.2d 160, 168 n.10 (5th Cir. 1993). The district court plainly did not abuse its discretion in denying petitioners' Rule 24(b) application to intervene.

Cheryl J. HOPWOOD, Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers,
Plaintiffs,
v.
The STATE OF TEXAS; University of Texas Board of Regents; Bernard Rapopart, Ellen C. Temple, Lowell H. Lebermann, Jr., Robert J. Cruikshank, Thomas O. Hicks, Zan W. Holmes, Tom Loeffler, Mario E. Ramirez, and Martha E. Smiley, as members of the Board, in their official capacities; University of Texas at Austin; Robert M. Berdahl, President of the University of Texas at Austin in his official capacity; University of Texas School of Law; Mark G. Yudof, Dean of the University of Texas School of Law in his official capacity; Stanley M. Johanson, Professor of Law in his official capacity,
Defendants.

No. A 92 CA 563 SS.

United States District Court,
W.D. Texas, Austin Division.

Aug. 19, 1994.

MEMORANDUM OPINION

SPARKS, District Judge.

The plaintiffs, Cheryl J. Hopwood, a white female, and Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers, three white males, have brought suit against

the defendants[1] alleging violations of the Fourteenth Amendment, 42 U.S.C.A. § 1981 (West Supp. 1994), 42 U.S.C.A. § 1983 (West 1981), and Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 1981).[2] [FN2] All of these provisions prohibit discrimination because of race. For the alleged violations, the plaintiffs seek injunctive and declaratory relief, as well as compensatory and punitive damages. The plaintiffs contend the defendants discriminated against them by

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[1]Defendants Bernard Rapopart, Ellen C. Temple, Lowell H. Lebermann, Jr., Robert Cruikshank, Thomas O. Hicks, Zan W. Holmes, Jr., Tom Loeffler, Mario E. Ramirez, and Martha E. Smiley are sued in their official capacities as members of the University of Texas Board of Regents. Defendant University of Texas Board of Regents is the governmental entity created by Defendant State of Texas to administer the operation of the University of Texas system, which includes Defendant University of Texas at Austin as a component institution. Defendant University of Texas School of Law is an American Bar Association accredited law school operated by the University of Texas at Austin. Defendant Robert M. Berdahl is sued in his official capacity as president of the University of Texas at Austin. Defendant Mark G. Yudof is currently Provost of the University of Texas at Austin. At all times pertinent to this lawsuit, Yudof was Dean of the University of Texas School of Law and is sued in that official capacity. Defendant Stanley M. Johanson, a Professor of Law, is sued in his official capacity as Chair of the University of Texas School of Law Admissions Committee.

[2]The plaintiffs' Title VI, § 1981, and § 1983 claims serve as vehicles to enforce underlying rights guaranteed by the Fourteenth Amendment. Therefore, the law school's admissions program must be evaluated under the equal-protection clause of the Fourteenth Amendment.

favoring less qualified black and Mexican American applicants for admission to the University of Texas School of Law through the use of a quota system. This cause was tried before the Court, without a jury, on May 16th through May 20th and May 23rd through May 25th, 1994.

The cause focuses on one of the most divisive issues faced by society, affirmative action, and highlights the tension that exists when the individual rights of nonminorities come into conflict with programs designed to aid minorities. The plaintiffs have contended that any preferential treatment to a group based on race violates the Fourteenth Amendment and, therefore, is unconstitutional. However, such a simplistic application of the Fourteenth Amendment would ignore the long history of pervasive racial discrimination in our society that the Fourteenth Amendment was adopted to remedy and the complexities of achieving the societal goal of overcoming the past effects of that discrimination. Further, the Supreme Court, which is continually faced with trying to reconcile the meaning of words written over a century ago with the realities of the latter twentieth century, has declined to succumb to an original intent or strict constructionist argument. Therefore, the Court will decline the plaintiffs' invitation to ignore the law established by the highest court of this land and to declare affirmative action based on racial preferences as unconstitutional *per se*. The issue before the Court is whether the affirmative action program employed in 1992 by the law school in its admissions procedure met the legal standard required for such programs to pass constitutional muster. The Court, having carefully considered the evidence presented at trial, the arguments of counsel, and the briefing provided by the parties, finds that it did not.

I. HISTORICAL BACKGROUND

The reasoning behind affirmative action is simple--because society has a long history of discriminating against minorities, it is not realistic to assume that the removal of barriers can suddenly make minority individuals equal and able to avail themselves of all opportunities. Therefore, an evaluation of the purpose and necessity of affirmative action in Texas' system of higher education requires an understanding of past discrimination against blacks and Mexican Americans, the minorities receiving preferences in this cause, and the types of barriers these minorities have encountered in the educational system.

A. *Discrimination in Primary and Secondary Education*

The history of official discrimination in primary and secondary education in Texas is well documented in history books, case law, and the record of this trial. The Court, therefore, will address it only in summary fashion. Even after the Supreme Court's decision in *Brown v. Board of Education*, the State of Texas adopted a policy of official resistance to integration of its public schools. This policy of resistance resulted in numerous lawsuits and court-imposed desegregation plans throughout the past twenty years. Wright, vol. 19 at 38-44; Romo, vol. 17 at 45-51. Many of the school districts found to be operating dual systems of education were also found to practice official discrimination against black and Mexican American students. Wright, vol. 19 at 40-43; Romo, vol. 17 at 45-51; Rodriguez, vol. 17 at 8-9.

The problem of segregated schools is not a relic of the past. Despite the fact that the public school population is approximately half white and half minority, minority students in Texas attend primarily majority minority schools while white students attend primarily white schools. Glenn, vol. 23 at 46-49. Further, as of May 1994, desegregation lawsuits remain pending against over forty Texas school districts. D-457; see also D-370, 373, 419; Wright, vol. 19 at 38-40; Romo, vol. 17 at 45-46. The lack of educational opportunity for minorities has been compounded by the lower socioeconomic status of minorities in Texas. Statistics continue to indicate significant disparities between minority and nonminority students in skills and academic knowledge attained in the public schools. Although the generally lower socioeconomic status of black and Mexican American families is partially accountable for some of the disparities, the gap is exacerbated by historically inferior educational preparation of minorities. Glenn, vol. 23 at 30-36. Further, at each educational level, there is a marked decline in the level of attainment by minorities, as reflected in comparison of drop-out rates between minorities and nonminorities and the percentages of the respective groups that graduate from high school and college.[3]

B. *Discrimination in Higher Education*

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[3]In 1990, the percentage of persons age 25 or older who completed high school was 81.5% non-Hispanic white, 66.1% black, and 44.6% Hispanic. D-411. College graduate rates for the same year reflect 25.2% non-Hispanic whites, 12% black, and 7.3% Hispanic. D-412.

As with primary and secondary education, Texas' system of higher education has a history of state-sanctioned discrimination. Discrimination against blacks in the state system of higher education is well documented in history books, case law, and the State's legislative history. The State of Texas, by constitution and statute, previously required the maintenance of "separate schools . . . for the white and colored children." *See* Tex. Const. art. VII, § 7 (1925, repealed 1969). This policy resulted in the establishment of segregated schools for blacks that were inferior to the white schools. Further, opportunities available to blacks to attend college were extremely limited.[4]

In 1946, when Heman Sweatt, a black man, sought admission to the law school and was refused admission, a Texas court, while holding that Article VII, Section 7 of the Texas Constitution precluded his admission, ordered the state to provide a law school for blacks. *See Sweatt v. Painter*, 210 S.W.2d 442 (Tex. Civ. App.--Austin 1948). The State hastily created a makeshift law school that had no permanent staff, no library staff, no facilities, and was

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[4]The Texas Legislature created Prairie View State Normal & Industrial College for Colored Teachers at Prairie View (now Prairie View A & M University) for the education of "students to be taken from the colored population of this State." Wright, vol. 19, at 17, 19-21. Until 1947, it remained the only state-supported institution of higher learning open to black students in Texas; no type of professional training was available to blacks. *Commentary*, Tex. Const. art. VII, § 14 (West 1993). In 1947, to avoid integration of the University of Texas, the Texas Legislature created the Texas State University for Negroes (now Texas Southern University). *Id.* at 21-22; D-382.

not accredited. *Sweatt v. Painter*, 339 U.S. 629, 632, 70 S. Ct. 848, 849-50, 94 L. Ed. 1114 (1950). In 1950, a unanimous United States Supreme Court ruled that the State of Texas' provisions regarding the legal education of white and minority students violated the Fourteenth Amendment and ordered that Sweatt be admitted to the previously all-white University of Texas School of Law. *Sweatt*, 339 U.S. at 636, 70 S. Ct. at 851. Sweatt left the law school in 1951 without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings. Wright, vol. 19 at 24-25.

The *Sweatt* case is the most flagrant incident of state-sanctioned discrimination occurring against blacks at the University of Texas. However, the record reflects that during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students. Mexican American students were segregated in on-campus housing and assigned to a dormitory known as the "barracks," as well as excluded from membership in most university-sponsored organizations. Romo, vol. 17 at 43. Additionally, until the mid 1960s, the Board of Regents policy prohibited blacks from living in or visiting white dormitories. Wright, vol. 19 at 26-28; D-482.

Beginning in the mid 1970s, discrimination in Texas' system of higher education came under attack through a court-ordered investigation by the Department of Health, Education and Welfare (HEW) Office for Civil Rights (OCR). The investigation of Texas' system resulted from a lawsuit initiated in 1970 to require HEW

to take action to enforce the provisions of Title VI.[5] The court-ordered investigation of ten states, which did not include Texas, began in 1973. In 1977, the court extended the order to an additional six states, which included Texas. Ashworth, vol. 12 at 8; D-296.

Title VI proscribes discrimination that violates the equal protection clause of the Fourteenth Amendment. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 286-87, 98 S. Ct. 2733, 2746-2747, 57 L. Ed. 2d 750 (1978). The prohibitions against discriminatory conduct contained in Title VI govern "program[s] or activit[ies] receiving Federal financial assistance." 42 U.S.C.A. § 2000d. Thus, "Congress was legislating to assure federal funds would not be used in an improper manner." *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6, 99 S. Ct. 2721, 2729 n.6, 61 L. Ed. 2d 480 (1979). The University of Texas, as a recipient of Title VI funds, is required to comply with Title VI.

The Department of Education, as the successor agency to HEW, is the governmental agency charged with the enforcement of Title VI and the review of programs funded through the DOE. The DOE has promulgated regulations to implement the provisions of Title VI, including regulations providing for affirmative action in certain circumstances. The regulations state that "[i]n administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take

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[5]*See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973), *dismissed sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

affirmative action to overcome the effects of the prior discrimination." 45 C.F.R. § 80.3(b)(6)(i) (1993). The regulations state further that even if a recipient has never implemented discriminatory policies, if its services and benefits have not been equally available to some racial or nationality groups, the recipient may "establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." 45 C.F.R. § 80.5(j).

Between 1978 and 1980, the OCR conducted an investigation of Texas' public higher education system. The investigation culminated in a finding that Texas had "failed to eliminate vestiges of its former de jure racially dual system of public higher education, a system which segregated blacks and whites." D-297. Additionally, the OCR found that Hispanics were significantly underrepresented in state institutions and indicated it would continue its investigation of discrimination against Hispanics. *Id.*

During the early 1980s, the OCR and Texas officials engaged in considerable negotiations regarding efforts to bring Texas into compliance with Title VI. Texas, in an effort to achieve a state-wide desegregation plan acceptable to the OCR, attempted to address OCR concerns through submission of the Texas Equal Education Opportunity Plan for Higher Education (Texas Plan), which included a commitment to the goal of equal educational opportunity and student body desegregation for both black and Hispanic students. D-237. In 1982, Assistant Secretary of Education Clarence Thomas informed Governor Clements that the Texas Plan was deficient because the numeric goals of black and Hispanic

enrollment in graduate and professional programs were insufficient to meet Texas' commitment to enroll those minority students in proportion to the representation among graduates of the state's undergraduate institutions. Ashworth, vol. 12 at 16-17; D-284. Texas revised its plan and resubmitted it to the OCR; the OCR found the modified plan to be deficient because it did not set targets for increasing minority enrollment for each institution, instead of on a statewide basis, and it did not project achievement dates for the targeted goals. Ashworth, vol. 12 at 19-20; D-219.

In 1983, the District Court for the District of Columbia entered an order in the ongoing Title VI-enforcement suit, in which the court found that "Texas has still not committed itself to the elements of a desegregation plan which in defendants' judgment complies with Title VI." D-446. The court ordered the DOE to begin enforcement proceedings against Texas unless Texas submitted a plan in full conformity with Title VI within forty-five days. Ashworth, vol. 12 at 22-23; D-446. In response to the order, the OCR submitted thirty-seven suggested measures for increasing black and Hispanic student enrollment in professional and graduate programs at traditionally white institutions. Among the suggestions were that each graduate and professional school should re-evaluate its admissions criteria and that "admissions officers will consider each candidate's entire record and will admit black and Hispanic students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." D-220.

In June 1983, the Texas Plan, as amended to account for the deficiencies identified by the OCR, was

accepted by OCR as being in compliance with Title VI.[6] However, acceptance was contingent on adequate funding and completion of key activities within a specified time. D-314. Further, the Texas Plan was subject to monitoring for compliance until 1988. Ashworth, vol. 12 at 23, 25-26.

In November 1987, OCR contacted the state regarding the expiration of the plan in 1988 and indicated OCR would perform a final evaluation to determine if further action would be necessary to bring Texas into compliance with Title VI. OCR further instructed state officials that, pending the evaluation, Texas should continue to operate under the plan. Ashworth, vol. 12 at 32-34; D-323.

Because Texas Higher Education Coordinating Board officials determined Texas had not met the goals and objectives of the plan, the board voluntarily developed a successor plan (Plan II) to avoid a mandate from the federal government to negotiate another plan. Ashworth, vol. 12 at 34-35; vol. 13 at 45-46. Plan II did not contain any specific numeric enrollment goals but

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[6]D-314. The revised plan raised the goal previously set for increased minority enrollment in graduate and professional schools. The individual goal for UT-Austin had been ten additional black students and two additional Hispanic students. Ashworth, vol. 12 at 26-27; vol. 13 at 56-58. The revised plan included a commitment to "seek to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs." D-238a at 5.

retained Texas' commitment to increasing black and Hispanic student enrollment. D-326 at 9.

To date, OCR has not completed its evaluation to determine if Texas is in compliance with Title VI.[7] However, in January 1994, the DOE notified Governor Richards that OCR was continuing to oversee Texas' efforts to eliminate all vestiges of de jure segregation and that it would be reviewing the Texas system in light of *United States v. Fordice*, ___U.S. ___, 112 S. Ct. 2727, 120 L. Ed. 2d 575 (1992). Ashworth, vol. 12 at 35-38; D-293.

Against this historical backdrop, the law school's commitment to affirmative action in the admissions process evolved.

II. THE ADMISSIONS PROCESS

A. *Evolution of the Admissions Process and Affirmative Action*

The law school's admissions procedure was not always a complicated process. In the early 1960s, all applicants who had taken the LSAT and had at least a 2.0 or 2.2 grade point average on a 4.0 scale were accepted.[8]

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[7]Ashworth, vol. 12 at 32-24. The government, as usual, proceeds with "all deliberate speed."

[8]Johanson, vol. 3 at 12. Ernest Smith, who was a member of the admissions committee from 1965 through 1970 and dean of the law school from 1974 to 1979, testified by deposition that his recall of the required grade point average at that time was 3.0. Smith depo. at 7. Although neither Smith nor Johanson had exact recall of the number, their testimony is

In about 1965, the number of applicants began to significantly exceed the law school's capacity, and, as a result, the law school established additional criteria to aid in the selection process. Smith depo. at 7-8.

Under the more selective system, a baseline was established each year based on the Texas Index (TI).[9] The law school automatically admitted applicants whose TI exceeded the baseline, and the admissions committee reviewed applicants whose TI was belw the baseline. This procedure was used until the late 1960s when an inundation of applications meeting the baseline criterion created a class of more students than could be adequately accommodated and precluded review of those who did not qualify for automatic admission. That particular year, the first-year class of law students consisted of almost 700 students. Johanson, vol. 3 at 14.

As a result, the law school modified the admissions process and changed the automatic admission baseline to a presumptive admission score. Additionally, the admissions committee began to use a presumptive denial baseline, and applicants whose TI fell below that baseline were presumptively denied admission. Also during the late 1960s, the law school began implementing affirmative

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consistent in that the qualifications for admission at the time were minimal.

[9]The Texas Index is a composite number calculated by the Law School Data Assembly Service (LSDAS) that reflects an applicant's grade point average and LSAT score. The weight attributed to each component of the TI is determined by a prediction formula derived from the success of first year students in preceding years. Johanson, vol. 3 at 7-10.

action by attempting to recruit minority individuals who had performed well in the CLEO program.[10] The only race or ethnic-based scholarships available during this time, however, were limited to "whites only." Smith depo. at 12.

A perception began to develop that the CLEO program had shifted its focus from students who were just below the level where law schools would seriously consider them for admission to students who were significantly below that level. Smith depo. at 14-16. Therefore, those responsible for admissions at the law school felt that the CLEO program could not successfully prepare the participants in one summer to be competitive students in a regular law school class. *Id.* at 16. Additionally, minorities represented only a small percentage of the entire pool of applicants to the law school, and law schools around the country competed for the top minority applicants. *Id.* at 18. In 1971, after the law school terminated its participation in the CLEO program, the law school admitted no black students. Wright, vol. 19 at 32.

In the early 1970s, because of the university's concern over the few minority students enrolled in the law school, a separate admissions committee, informally called

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[10]The CLEO (Council on Legal Education Opportunity) program provided summer training at participating law schools for minority graduates of various universities. At the end of the training period, the CLEO participants were given exams. Based on their performance on those exams, some of the participants were admitted to the law school. Smith depo. at 9-10.

the "Treece committee,"[11] was formed to consider applications from minority students and disadvantaged nonminority students.[12] The purpose of the committee was to ensure that the applicants the committee reviewed received "fuller consideration" than they would have in the regular admissions process. Smith depo. at 16. The applicants were evaluated separately from the applicants before the regular admissions committee, and the sole criterion for applicants before the Treece Committee was whether the applicant had a reasonable prospect of passing the first year.[13] The Treece committee had no set goals for the number of admissions to be made through the committee, and the number of applicants it admitted had little impact on the regular admissions.[14] In 1977, the Treece committee considered 500 applicants,

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[11]The committee was named after the chair of the committee, Professor James Treece.

[12]In the summer of 1974, just before Ernest Smith became dean of the law school, the then president of the university, Steve Spurr, expressed concern about the low minority population in the law school. Spurr indicated that a public university had an obligation to train a reasonably representative cross-section of the population in the law and that the TI, as the focus of the admissions procedure, did not adequately account for an applicant's ability to overcome past economic, cultural, and discriminatory practices. Smith depo. at 17.

[13]Johanson, vol. 3 at 15. Professor Johanson did not recall if any of the members of the Treece committee were also members of the regular admissions committee.

[14]During this time, the law school entering class was comprised of 500 students, and no more than 10% of the students could be nonresidents. Johanson, vol. 3 at 17.

including approximately 100 nonminority applicants. Of these applicants, the Treece committee admitted sixty-eight minority students and three nonminority students. "Thus, while the special subcommittee did consider and grant admission to some white applicants, the predominant objective of the special subcommittee was to increase minority enrollment at the Law School." P-1 (Smith memo to Rogers, Oct. 18, 1978, at 1).

The applications before the regular admissions committee were subjected to a different process. Because of the volume of applications, the admissions committee could not give individual consideration to each application. Therefore, the law school implemented a three-category system to narrow the pool of applications requiring committee consideration. The first category of applicants, those with TIs above a certain number, were granted "administrative admission"; that is, administrative personnel automatically sent offers of admission to these applicants based on the applicants' TIs. A "presumptive denial" category was at the other end of the scale, in which administrative personnel screened the applications based on specified criteria. If the administrative person determined the file warranted further consideration, the file was sent to the regular admissions committee. The admissions committee reviewed the individual applications in the middle category or "discretionary zone," which included those referred to the committee from the presumptive denial category.

The law school used this admissions procedure until 1978 when, as a result of the Supreme Court's decision in *Bakke*, the law school reassessed its minority admissions procedure. The law school determined that, although its procedure differed from that at issue in

Bakke, the use of the separate committees to evaluate applicants was defective.[15] Therefore, then Dean Smith directed the admissions committee to operate as one unit rather than as two subcommittees and instructed the committee to establish the administrative admission and presumptive denial lines at levels that would increase the number of applicants given individual consideration. P-1.

After 1978, Johanson set the lines to allow for a reasonable number of minority candidates to be included with nonminorities in the discretionary zone. Johanson, vol. 3 at 21. The discretionary zone was then divided into five or six "bands."[16] The law school offered admission to a set percentage of applicants from each band. The percentage decreased from the first or top band to the last, a reflection of the diminishing credentials of the bands. The minority applicants were primarily clustered in the lower bands with few in the upper bands. Wellborn, vol. 24 at 45.

Within each band, minority and nonminority files were blended into groups of thirty. Each pile was reviewed by three committee members, each of whom was allocated a certain fixed number of votes determined by the yield desired from a particular band. Therefore, each member of the committee ultimately had total discretion to decide whether and what extent to implement

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[15]The law school's procedure differed from the *Bakke* procedure in that no fixed number of seats were set aside for minorities and some nonminorities were evaluated by the Treece committee. P-1 (Smith memo at 3).

[16]Professor Johanson testified the system used five bands, while Professor Wellborn testified there were six bands.

affirmative action for each pile of files that person reviewed. Wellborn, vol. 24 at 9.

Professor Wellborn testified he and other faculty members perceived two problems with this system: 1) potential unfairness to nonminority candidates who could be affected by affirmative action solely as a result of the pile in which they were included and 2) the application of personal affirmative action efforts, requiring no justification to the committee as a whole, rather than a system based on a set policy. As a result, in 1980, the law school abandoned the banding admissions procedure and formed the minority subcommittee.

The minority subcommittee was a part of the full committee that reviewed and voted on nonminority files. All minority files below the presumptive admission line were studied by the minority subcommittee.[17] The subcommittee would then bring its recommendations to

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[17]Evidently, sometime between 1978 and 1991, the automatic or administrative admission line was changed to a presumptive admission line. The testimony is unclear as to when this occurred and, apparently, even after the change was made, those involved with the admissions procedure continued to make reference to automatic admission. Johanson, vol. 3 at 26, 66; see also id. at 29 ("I think we used the term 'automatic admit' for a long period of time, when it became part of the colloquium but did not describe the process."). Dean Sutton, who succeeded Dean Smith and was dean from 1979 to 1984, established the rule that approximately 55% of the resident class should fall within the presumptive admission category. Johanson, vol. 3 at 24-25. Approximately 75% of nonresident applicants are admitted from the presumptive admission category for nonresidents. *Id.*

the full committee. At some point during the middle of the admissions process, the subcommittee would present a report to the full committee that summarized the features of the minority files being recommended for admission. The actual files were also available at the meeting so the full committee could make its own determinations about the recommended minority applicants in comparison to the nonminority applications pending at the time. At this point in the process, the members of the full committee were involved in reading piles of nonminority files and were cognizant of the qualifications of the nonminorities. Although this method often resulted in heated discussion and disagreement among committee members over whether to admit a particular candidate, the process also provided open discussion rather than the silent voting, which could have reflected personal agendas, that occurred with the banding procedure. Wellborn, vol. 24 at 15.

In the early 1980s, during these meetings, the committee members spent considerable time debating whether individual minority candidates met minimum admissions standards and, thus, could do passing work in law school. As a result, the full committee often examined specific minority files. The ultimate effect was that the entire committee voted on each minority applicant that the subcommittee brought before the full committee. Goode, vol. 9 at 6.

However, as the pool of minority candidates improved, the focus of the meetings shifted to choosing among minority candidates that the committee knew, based on their TIs, could succeed in law school. Wellborn, vol. 24 at 33.

Therefore, less full committee review of each individual file became necessary.[18]

Ultimately, the admissions committee determined that the process was inefficient and not the most effective way of processing minority applicants. Johanson, vol. 5 at 27. In April 1991, "[a]fter considerable debate, the [admissions] committee, over some strong opposition, directed the chair [Johanson] to form a subcommittee (including Deans Aleman and Hamilton and the two minority students) which was to review the minority files and recommend sufficient candidates for admission to achieve a class that was 5% Black and 10% MA."[19] Therefore, by 1992, the full admissions committee no longer selected individual applicants for admission. Wellborn, vol. 24 at 53. Instead, the minority subcommittee compiled a list and presented it to the full committee, which made a judgment of how many offers to give to minority applicants. The minority subcommittee

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[18]Because the law school was receiving better qualified minority applicants, the focus of the process changed from whether to accept a particular minority applicant to a more selective process between the individual minority applicants. Wellborn, vol. 24 at 33. Had the admissions committee continued to apply its previous standards, the number of minorities in the entering class would have continued to grow. However, the committee elected instead to "take advantage of this opportunity to have more excellent minority students than we had before, who would be more competitive with the non-minority students, but perhaps in more limited numbers that would still constitute reasonable representation." *Id.* at 35.

[19]P-25. The percentage goals are based on the percentages of minority college graduates. *See supra* note 6.

was then delegated the task of deciding which individual minority applicants were to receive offers of admission. Thus, by 1992, the admissions process, although involving some interaction and exchange of information between the full committee and minority subcommittee, was markedly similar to the pre-*Bakke* procedure of two separate committees. This 1992 procedure is the crux of this lawsuit.

B.*1992 Admissions Process*

In 1992, the admissions committee was comprised of nine professors, two assistant deans, and four students. Johanson, vol. 6 at 26. The minority subcommittee was comprised of Johanson, Aleman, and Hamilton, all of whom were also members of the full committee.[20] Aleman, however, did not participate in reviewing nonminority applications. Johanson, vol. 6 at 25-26.

In 1992 when an application arrived, administrative personnel placed it in an individual folder, to which additional materials, such as letters of recommendation, were added as they arrived at the law school. Each folder was color-coded based on two criteria: residency and race or ethnicity. The residency classification indicated whether the applicant was a resident or nonresident of Texas. The race or ethnicity classification was based on which of several boxes the applicant checked on the application: Black/African American, Native American,

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[20]Professor Johanson, who is white, has been on the admissions committee since 1964 and chair of the committee since 1973. Dean Aleman is an assistant dean and is Mexican American. Dean Hamilton was an assistant dean from 1990 through 1993 and is black.

Asian American, Mexican American, Other Hispanic, White, or Other. Hamilton, vol. 2 at 19-20.

The application deadline was February 1. However, because the law school wished to get early offers sent to top applicants in late January if possible, Johanson drew initial presumptive admission lines as soon as he had an initial computer printout showing the numbers and qualifications of the applicants. Johanson, vol. 3 at 26-27. At this point, about half of the applications were complete; therefore, Johanson drew the initial lines relatively high to avoid too many early offers of admission before the quality of the entire pool of applicants was defined.[21] The goal of the initial presumptive admission lines Johanson drew was to ensure that the top candidates in each category received offers of admission from the law school as soon as possible.[22]

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[21]At some point in the process, the presumptive admission line for nonminority resident admissions was adjusted downward to ensure that approximately 55% of the resident admissions would be presumptively admitted. The 55/45 split did not apply to nonresident applicants, approximately 75% of whom were admitted presumptively on the basis of their TI. *See supra* note 17.

[22]Johanson, vol. 3 at 26. In 1992, the law school received approximately 2100 resident applications and 2300 nonresident applications. Johanson, vol. 3 at 35. The pool of nonresident applicants was very strong, many with credentials well above those of the presumptively admitted residents. *Id.* at 36. Accordingly, the presumptive admission and denial scores were set at a higher level for nonresident applicants. However, as with resident applicants, lower scores were set for Mexican American and black nonresident applicants than for nonminority nonresident applicants. Johanson testified the

Once Johanson determined which files were in the presumptive admission category, he conducted a preliminary review of the files.[23] By the end of the admissions process, Johanson reviewed 300 to 350 resident files and 200 to 250 nonresident files in this category. Johanson, vol. 3 at 32-35. In his review of these files, Johanson checked to see if the applicant's TI was inflated by high grades in a noncompetitive major or at a weak school or if there was some other questionable feature of the applicant's file. Johanson generally held those files for further review in the discretionary zone. Johanson dropped approximately ten percent of the presumptive admission applicants into the discretionary category. Those applicants with a high TI reflecting a high LSAT and high grades in a rigorous major at a leading undergraduate institution were admitted by Johanson, who had unilateral authority to admit any applicant in this category without further consultation with the full admissions committee. D-362.

At the other end of the spectrum, Johanson set another line, and applicants whose TIs fell below that line were presumptively denied admission. One or two members of the admissions committee reviewed each application in this category to determine if the TI

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enrollment yield for nonresidents is approximately 26%, meaning that the law school has to offer approximately four nonresidents admission to enroll one. *Id.* at 37. The enrollment yield for residents is 66 to 68%, that is, for every 100 offers of admission, 66 to 68 resident applicants accept.

[23]Johanson reviewed minority and nonminority files together as a group during the preliminary review process. Johanson, vol. 6 at 55.

adequately reflected the applicant's likelihood of success in law school or competitive standing relative to the entire applicant pool. Johanson, vol. 3 at 31-32; P-41; D-362. Generally, as a result of this review, twenty to forty files were upgraded from the presumptive denial zone to the discretionary zone, although Johanson did not recall the specific number of files moved to the discretionary zone in 1992. Johanson, vol. 5 at 24-25.

The middle category was comprised of those applicants whose TIs fell between the presumptive denial line and the presumptive admission line, those applicants who Johanson had moved down from the presumptive admission category, and those applicants who reviewers had moved up from the presumptive denial category. In the middle discretionary category, reviewers focused less attention on the applicant's numbers, as all were relatively close, and instead carefully evaluated the applicant's qualifications as reflected by the entire file. Goode, vol. 9 at 4; D-362.

The standards the law school applied to assess applicants in this system differed based on race and national origin in two ways. First, Johanson's determination of the presumptive admission and denial TIs varied between nonminorities and minorities.[24] By March 1992, Johanson had lowered the presumptive admission score for resident nonminorities from a

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[24]Johanson's setting of these scores was a process that evolved over the course of the admissions process based on the pool of applicants, the number of offers, and the number of acceptances. Initially, the numbers were set high and lowered as the yield from offers and composition of the entering class began to develop. Johanson, vol. 5, at 10-11; P-38--P-44.

threshold setting of 202/90 to 199/87.[25] Similarly, Johanson lowered the presumptive admission score for Mexican American applicants from 196/84 to 189/78 and the presumptive admission score for black applicants from 192/80 to 189/78. P-49. The presumptive denial score for nonminorities was 192/80, and the presumptive denial score for blacks and Mexican Americans was 179/69. Thus, the presumptive denial score for nonminorities was higher than the presumptive admission score for minorities.

Additionally, the law school admissions committee had different procedures for the review of nonminority and minority files in the discretionary zone. Nonminority files were divided into stacks of thirty, which were reviewed by three members of the admissions committee.[26] Each person on the three-person subcommittee voted, on an individual basis with no verbal or written explanation, to offer admission to a set number

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[25]P-38. In 1992, the law school was faced with two different types of TIs, one based on a two digit LSAT score and one based on a three digit LSAT score. This was a result of the change in the scaling of the LSAT from a 10-to-48 scale to a 120-to-180 scale. Johanson therefore had to set presumptive lines coordinated to two separate TI formulas to accommodate the two types of TIs received for applicants. Johanson, vol. 3 at 26-27.

[26]In 1992, the admissions committee reviewed 18 stacks in the nonminority discretionary zone--17 stacks of 30 files and one stack of 16 files. P-58, P-59. This process began in early March and was virtually complete by mid to late April. Johanson (by depo.), vol. 25 at 7.

of applicants from within the stack of thirty files.[27] After the three members completed their independent screening of the files, Johanson compiled a master tally sheet reflecting the number of votes received by each applicant in the group of thirty-five. See, e.g., P-73. Subject to Johanson's review, those applicants that received two or three votes were offered admission.[28] In 1992, the law school made an average of nine offers of admission per stack. P-58. Those who received no votes were automatically denied admission at that time.[29] The law school sent a letter offering applicants who received one vote a place on the waiting list.

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[27]In 1992, Johanson allotted each person on the subcommittees nine votes per stack. D-332 at A-29. Committee members were required to screen five stacks. P-55. Therefore, although each member of the admissions committee reviewed more than one stack of files, no individual reviewed all the files in the discretionary zone.

[28]Johanson testified that he had "rarely, if ever" vetoed a committee recommendation based on two or three votes, except in instances where an administrative problem might make an individual ineligible for law school.

[29]Johanson, in rebuttal testimony provided by deposition, testified, "[T]hose candidates who receive zero votes to admit, they're done. I don't even look at their files. Three people have said in comparison to our applicant pool they are not worthy of being admitted. They will--the next day they will get their denial . . . ." Johanson (by depo.), vol. 25 at 10 (emphasis added). This testimony contradicts the statement in the law school's "Statement of Policy on Affirmative Action," which states that all final decisions on each applicant file are made by Johanson. *See* D-362 at 4.

The minority subcommittee reviewed the minority files. In theory, each member of the subcommittee was to be part of the three-person subcommittees that reviewed the nonminority files. The testimony reflected, however, that in 1992 Aleman was not on any of the nonminority screening subcommittees. *Compare* D-362 *with* Johanson, vol. 6 at 26. According to the testimony, instead of each member of the minority subcommittee performing an individual review of the minority files, as was the procedure for review of nonminority files, the minority subcommittee met as a group and reviewed each minority applicant's file.[30] The subcommittee did not review a set number of files at each meeting but, instead, made as many decisions as the members felt comfortable with until their "decision-making powers started to wane." Johanson, vol. 5 at 30. Resident presumptive denial minority files were screened exclusively by Johanson and Hamilton. *Id.* at 25.

The members of the minority subcommittee attended the meeting of the full committee and provided the full committee with a summary of the files the subcommittee believed to be good applicants for admission. Wellborn, vol. 24 at 18. Although the evidence reflected that the subcommittee shared general information about the minority pool of applicants with the

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[30]Both Johanson and Hamilton attended all the meetings; Aleman's attendance was not regular. Frequently, student members of the subcommittee attended the meetings, although they were not voting members of the subcommittee. Johanson, vol. 5 at 28-29.

full committee, the minority subcommittee's admission decisions on individual applicants were virtually final.[31]

C. *Admission Goals and Guidelines*

The law school is the State's premier law school and is top-rated nationally. The cost of a legal education at the law school, a state-supported institution, is inexpensive in comparison to other schools of its caliber and, therefore, a bargain for the quality of education the law school's students receive. As a consequence, over 4000 applicants to law school each year compete for approximately 500 available seats.[32]

In selecting the entering class, the law school admissions committee has two specified requirements it must achieve. First, state law mandates the percentage of nonresidents that may be included in the entering class. In 1992, the law school was prohibited from having more

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[31]Johanson testified that, although a "particularly naughty problem" might be brought before the entire committee, almost all final decisions were made by the subcommittee. Johanson, vol. 5 at 29; *see also* Johanson, vol. 6 at 47.

[32]The law school received 4,494 applications for the fall 1992 incoming class. It offered admission to 936 applicants to fill a class of slightly over 500 students. D-447 (Aff. of Rita Bohr at A-4). The overall median GPA for entering students was 3.52, and the overall median LSAT was 162 (89th percentile). D-433. The median figures for nonminorities were a GPA of 3.56 and an LSAT of 164 (93rd percentile); for blacks, a GPA of 3.30 and an LSAT of 158 (78th percentile); and for Mexican Americans, a GPA of 3.24 and an LSAT of 157 (75%). *Id.*

than fifteen percent nonresidents in the entering class.[33] The other fixed figure to which the admissions committee must adhere has been set by the Board of Regents. This mandate requires the entering class to be composed of at least 500 students.

In addition to these established figures, the law school attempts to meet the targets established by the Office of Civil Rights through the Texas Plan of ten percent Mexican American students and five percent black students in an entering class. Johanson, vol. 4 at 10. These numbers reflect an effort to achieve an entering class with levels of minority enrollment generally consistent with the percentages of black and Mexican American college graduates. The OCR figures, however, are aspirations only, subject to the quality of the pool of applicants. Johanson, vol. 4 at 9; Goode, vol. 9 at 12-13.

Personal interviews are not part of the law school's admission process.[34] Therefore, the law school must make its decision based on the information provided in the applicant's file, which, in addition to the application form and LSDAS material, may include a personal statement or letters of recommendation. The law school used the TI as an administrative tool to order candidates for review in the admissions process. However, the law

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[33]Johanson, vol. 4 at 9, 31. The percentage of nonresidents that may comprise an entering class has recently been increased to 20%. Johanson, vol. 4 at 46.

[34]Nevertheless, Hamilton, as assistant dean of admissions responsible for recruiting the law school class, actively recruited minority students through "one-on-one" discussions and scholarship enticements. Hamilton, vol. 2 at 4-5, 9, 12-13.

school did not rely solely on the TI as the basis for admissions decisions but instead used it to create presumptions that could be overcome upon individual review of the files.[35] [FN35] The importance of individual review stems from the fact that the applicants selected for admission come from a relatively narrow band within the full range of scores, and a difference of few points does not necessarily correlate with more successful work in law school. Johanson, vol. 3 at 11; Stein, vol. 18 at 15. Further, the TI does not adequately reflect the qualifications and characteristics a law school should consider in developing a diverse student body, which provides substantial educational benefit for all members of a law school class. Brest, vol. 22 at 14.

III. THE PLAINTIFFS

In 1992, Hopwood, Elliott, Carvell, and Rogers applied for admission to the law school. Hopwood is a white female; Elliott, Carvell, and Rogers are white males. None of the plaintiffs are Mexican American and all are residents of Texas.[36]

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[35]The practice of using the GPA/LSAT index as a sorting mechanism is used by many nationally prominent law schools. Brest, vol. 22 at 13-14; Stein, Vol. 18 at 15; Bollinger, vol. 16 at 11-14; Wegner depo. at 9-10. However, none rely on the index as the sole basis for admission decisions. Id.; see also D-448.

[36]The defendants contend that Hopwood should have been evaluated as a nonresident and, accordingly, would not have been in the presumptive admit range for nonresidents. However, Johanson testified that Hopwood did not misrepresent her status to the law school. She stated in her

A. *Cheryl Hopwood*

Cheryl Hopwood had a TI of 199, which placed her in the resident presumptive admit range. Hopwood's TI reflects a 3.8 grade point average and an LSAT score of 39.[37] Hopwood's application indicates she received an associate's degree in accounting from Montgomery County Community College in May 1984 and a bachelor's degree in accounting from California State University in Sacramento in 1988. The application further indicates she is a certified public accountant in California, she worked twenty to thirty hours a week while obtaining her undergraduate degree, and she was active in Big Brothers and Big Sisters in California. P-145. Hopwood submitted an additional letter to the law school dated January 22, 1992, requesting permission to attend law school on a limited basis the first year, if accepted, because of the needs of her child, who had been born with cerebral palsy.[38] Hopwood's application file contains no letters of

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application she was married to a person in the military who was stationed in Texas at the time of her application. The law school treated her application as that of a resident throughout the process. Johanson, vol. 5 at 14. Further, Hopwood's residency classification was consistent with the law school's policies in effect at the time. *Id.*; Johanson, vol. 4 at 44-45; Hopwood, vol. 8 at 12-13.

[37]Hopwood's LSAT score placed her in the 83rd percentile, well below the median LSAT for nonminorities in the 1992 entering class. P-145; D-43. Her two-digit TI was an 87, which correlates to 199 in the three-digit scoring system.

[38]Hopwood testified that although her child was initially diagnosed with cerebral palsy, she has been found to have an extremely rare muscle disease and is severely handicapped.

recommendation.[39] Additionally, her responses to the questions are brief and do not elaborate on her background and skill. She provided no personal statement with the application.[40]

After his initial review of Hopwood's file, Johanson dropped her from the presumptive admission zone to the discretionary zone because, in his evaluation, she had not attended schools that were academically competitive with those of the majority of the applicants, had a large number of hours at junior colleges, and was able to maintain a high GPA although working a substantial

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Hopwood, vol. 8 at 8-9. This information is not included in her admission file.

[39]Hopwood testified that although she had been prepared to submit letters of recommendation, a person in the admissions office informed her that, because of the large number of applications, the school did not have time to look at recommendations. Hopwood, vol. 8 at 6.

[40]Hopwood testified that while in high school, she applied for college at Temple, Princeton, and Penn State and was offered admission at each school. However, because she had to pay for her own education and had to work her way through school, she could not afford to go to these schools. Hopwood, vol. 8 at 4. However, this information is not included in Hopwood's application despite the following statement on the application: "Please make any other comments about your college transcripts or your preparation for college (such as disadvantaged educational or economic background) that you believe will help the Admissions Committee in evaluating your application."

number of hours.[41] Her file was subsequently reviewed by a three-member subcommittee of the admissions committee, which was comprised of Associate Dean Michael Sharlot, Dean Hamilton, and a law student. P-217 (Answer to int. 3). Because Hopwood received only one vote as result of the subcommittee review, the law school sent her a letter, dated April 8, 1992, offering her a place on the waiting list.[42]

The letter, which stated "[w]e regret that we cannot grant you admission to the 1992 entering class of the Law School at this time," instructed Hopwood to return the attached form to the law school within three weeks if she wished to be placed on the waiting list. P-145. The letter further instructed Hopwood not to put her name on the list if she would not be able to accept an offer of admission as late as August. Hopwood testified she subsequently called the law school admissions office and was told offers could be made from the waiting list through the first week of school. Hopwood, vol. 8 at 11-12. Hopwood did not put her name on the list

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[41]Johanson, vol. 5 at 14-17. Johanson believed that Hopwood's ability to work a significant number of hours while maintaining a high GPA was indicative of earning her GPA while on "a fairly slow track" at a non-competitive institution. *Id.* at 15-16. In contrast, Associate Dean Sharlot found that Hopwood's achievement of a high GPA while working was a "definite plus." D-334. This "plus," however, was insufficient to overcome Hopwood's below-median performance on the LSAT and attendance at a series of "very weak schools." *Id.*

[42]Hopwood received one vote from Hamilton, who was also a member of the minority subcommittee. P-217 (Answer to int. 4); D-333 at A-37.

because personnel in the law school's admissions office could provide no information regarding the likelihood of admittance from the list and Hopwood did not believe she would be in a position to make last minute arrangements for her special childcare needs if she were admitted either just before or in the first week of classes. Hopwood, vol. 8 at 12.

The Court finds that, under Hopwood's circumstances, she was effectively denied admission when she received the April 8 letter. Her failure to accept a position on the waiting list or to seek a deferral of admission until the following year, which information the Court notes is not included in the law school's April 8 letter to Hopwood, does not negate this fact.[43]

B. *Kenneth Elliott*

Kenneth Elliott applied with a TI of 197, representing a GPA of 2.98 and an LSAT score of 167. Elliott's application indicates he received a B.B.A. in accounting from the University of Texas in 1984, is a certified public accountant, and has worked as an auditor

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[43]The Court notes that during 1992, individuals were offered admission from the waiting list. Of the 332 applicants offered a position on the waiting list in 1992, 75 were admitted. D-447 (Aff. of Rita Bohr at A-5). Hamilton testified that as late as the first week of classes, seven persons were admitted from the waiting list. Hamilton, vol. 2 at 65-67. However, the Court also notes from the affidavits of Johanson and Hamilton that Hopwood had little likelihood of acceptance from a waiting list. In fact, Hamilton specifically stated, "It is my belief that Ms. Hopwood [would] not have been admitted off the waiting list at a later time." D-333 at A-39.

or examiner for state agencies since receiving his undergraduate degree. P-153. In addition to his personal statement, Elliott's file contains two letters of recommendation from employment supervisors.

In the discretionary zone of nonminority applicants, Elliott's file was reviewed by a subcommittee of three that included Johanson. D-332 at A-33. Elliott received no votes, and the law school sent him a denial letter dated April 11, 1992. P-153. In July 1992, Elliott's father wrote a letter to Dean Mark Yudof in which he requested that Elliott's application for admission be reconsidered. P-165. Elliott's father further stated that Elliott did not know he was writing the letter and that Elliott's "friends and family all feel that he was not accepted to U.T. because of limited openings at U.T. due to mandatory minority and women quotas which use a large percentage of the openings."[44] The dean referred the letter to Hamilton, who informed Elliott's father that although she was not at liberty to discuss Elliott's application, she would pursue the matter with Elliott if Elliott felt he had been treated unfairly. Hamilton, vol. 2 at 67. Hamilton testified she telephoned Elliott, told him she had received a letter on his behalf, and invited him to come to her office to visit. Id. at 67-68. Hamilton testified Elliott canceled the first appointment and she scheduled a second appointment, which she canceled. Hamilton testified she subsequently called him back and told him she was placing him on the

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[44]P-165. The only copy of the letter in the record is an unsigned draft provided by the plaintiffs. Hamilton testified that the letter actually received by the law school had been administratively misplaced since the summer of 1992. Hamilton, vol. 2 at 68-69.

waiting list.[45] Elliott, however, testified he had no further conversations with anyone at the law school after the failed meetings and did not know he had been placed on the waiting list. Elliott, vol. 7 at 21.

Hamilton testified that on August 24, she decided to grant Elliott an offer of admission, left a message on his answering machine, and instructed admissions personnel to continue to try to reach him. Hamilton, vol. 2 at 58-59. Hamilton stated that approximately a week later, after classes had begun, Elliott returned her call but indicated it was impossible for him to attend school at that time. Id. at 59-60. However, in Hamilton's affidavit, submitted to this Court as part of the pretrial motions, Hamilton stated that Elliott never responded to her phone calls. D-447 (Supp.Decl. of Hamilton at 3). Further, Elliott's file contains no letters either notifying him of his placement on the waiting list or his admission to school, despite the existence of such documentation for others offered admission from the waiting list late in the process.

The Court finds that Elliott had to have realized, at minimum, his application was under reconsideration when an assistant dean initially contacted him. However, being offered a position on the waiting list, as the Court has already found, is not equivalent to admission. To determine whether Elliott actually received an offer of admission, the Court must evaluate the conflicting

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[45] *Id.* Johanson testified it was "quite unusual" for someone to be reconsidered and placed on the waiting list without Johanson's awareness of the decision. Johanson, vol. 5 at 19-21. He testified he knew nothing about Elliott being placed on the waiting list. *Id.*

testimony of Elliott and Hamilton. The discrepancies in Hamilton's affidavit and trial testimony, as well as the law school's lack of documentation of Elliott's status, weigh in Elliott's favor.[46] Accordingly, the Court finds that Elliott was not notified of his admission to law school.

In 1992, Elliott also applied to Baylor School of Law and Texas Tech School of Law. He was denied admission to Baylor. Although accepted at Texas Tech, a state university, Elliott declined the offer of admission by letter dated June 2, 1992. See D-401.

C. *Douglas Carvell*

Douglas Carvell had a TI of 197, which was based on an undergraduate GPA of 3.28 and an average LSAT score in the 76th percentile.[47] His application reflects that in 1991 he received his B.A. in political science from Hendrix College in Conway, Arizona. P-151. The LSDAS report indicates Carvell ranked 98th in his class of 247 at Hendrix College. P-151; D-336 at A-49. Carvell provided detailed responses to the application questions on typewritten attachments to his application.

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[46]The Court is not implying that Hamilton testified in an untruthful manner. However, because of the number of applicant files Hamilton was required to address and the time pressures under which she was working as the beginning of the school year approached, the Court believes it very possible her recall of the chronology of specific events may be inaccurate.

[47]Carvell's application reflects that he took the LSAT twice, receiving a score of 34 (61st percentile) the first time and a score of 164 (91st percentile) the second time. The LSAT factored in his TI is an average of these two scores.

Carvell's file included three letters of recommendation, one from a professor at Hendrix College that compliments his intellectual abilities but describes his performance as uneven, disappointing, and mediocre. P-151.

Because Carvell's TI placed him in the nonminority discretionary zone, his file was reviewed by a subcommittee of three. He received no votes from the two faculty members on the subcommittee, Professors Steven Goode and Mark Gergen, but did get one favorable vote from a student member of the committee. See D-335, D-336. Therefore, by letter dated April 15, 1992, the law school offered him a position on the waiting list, which he accepted. While he was on the waiting list, Carvell's file was reviewed by Associate Dean Michael Sharlot, a member of the admissions committee. Sharlot did not vote to admit Carvell from the waiting list. D-334 at A-43-A-44. By letter dated July 16, 1992, the law school denied Carvell admission. P-151.

In addition to the law school, Carvell applied for admission to Southern Methodist University School of Law and Vanderbilt School of Law. He was denied admission to Vanderbilt, but was accepted at SMU, where he has completed his first year of law school. Carvell, vol. 10 at 6-7. Carvell also applied to the University of Texas School of Business and was denied admission. *Id.* at 12. At SMU, Carvell is pursuing a master's of business administration in a joint program with the SMU law school. *Id.* at 6.

D. *David Rogers*

David Rogers had a TI of 197 based on his undergraduate GPA of 3.13 and an LSAT score of 166. In the early to mid-1980s, Rogers attended the University of Texas as a student in Plan II, an honors program. However, in 1985, he was dismissed because of his poor scholastic performance. Rogers, vol. 11 at 55. Rogers subsequently attended the University of Houston-Downtown and received an undergraduate degree in professional writing in 1990. P-171; Rogers, vol. 11 at 56. In 1992, Rogers received an advanced degree in professional writing from the University of Southern California. P-171. Rogers noted on his law school application that "as a white who attended an all-minority school for several years, and who was raised by a single mother, I have an unusual understanding of the challenges faced by women and minorities." P-171.

Rogers's application file contains no letters of recommendation. P-171; see also D-335 at A-46-A-47.

Rogers received no votes from any member of the subcommittee that reviewed his file in the nonminority discretionary zone. By letter dated April 7, 1992, he was denied admission to the law school. P-171.

IV. DISCUSSION

A. *Ripeness and Standing*

As a preliminary matter, the defendants contest the ripeness of two of the plaintiffs' claims and the standing

of all plaintiffs to bring this cause of action.[48] With regard to Hopwood and Elliott, the defendants argue their claims are not ripe because neither was denied admission.[49] As stated above, the Court has found both Hopwood and Elliott were, in effect, denied admission to the law school. Therefore, a ripe controversy exists between these two plaintiffs and the defendants.

The defendants contend Hopwood lacked standing to challenge the admissions policy because she failed to accept a position on the waiting list or to ask for deferred admission. Therefore, according to the defendants, she has failed to exhaust the administrative procedures available to her. The defendants further contend all plaintiffs lack standing in that none can show they would have been granted admission absent the challenged admissions policies.[50]

To have standing to challenge a governmental action, a plaintiff must demonstrate a concrete "injury in fact," a causal relationship between the injury and the challenged conduct, and a likelihood the injury will be redressed by a favorable decision. *Northeastern Fla.*

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[48]This matter was addressed at length in pretrial motions and hearings, and the transcripts and evidence related to those motions are evidence in this cause.

[49]As discussed above, the defendants claim Hopwood voluntarily removed herself from the admissions process and Elliott was offered admission.

[50]With regard to Elliott, the defendants contend he lacks standing to challenge the initial decision to deny him admission.

Contractors v. City of Jacksonville, ___ U.S. ___, ___-___, 113 S. Ct. 2297, 2301-02, 124 L. Ed. 2d 586 (1993). However, the "injury in fact" in an equal protection case involving a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group is the denial of the equal treatment and not the ultimate inability to obtain the benefit. *Id.* at ___, 113 S. Ct. at 2303.

The defendants assert this exception to requiring plaintiffs to show a direct causal relationship is limited in its application to challenges to the validity of express set-asides or reservations such as those addressed in *City of Jacksonville* and *Bakke*. The Court does not read the requirements for standing set forth in *City of Jacksonville* to be limited in the manner defendants contend. In defining standing as applied in equal protection cases, the Supreme Court reviewed its precedent on the issue. The overarching proposition of the cases the Supreme Court cited in reaching its holding was not that the causal-connection exception applied only to specific set-asides, but that an "injury in fact" stemmed from any governmental barrier that either created a discriminatory obstacle or had the effect of producing unequal access to a governmental benefit.[51] Accordingly, the Court finds all the plaintiffs have standing--they have sufficiently alleged that the law school's admission process is the cause of their injury and that a judicial order could

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[51]*See id.* ___ U.S. at ___-___, 113 S. Ct. at 2302-03 (discussing *Clements v. Fashing*, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982); *Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978); and *Turner v. Fouche*, 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970)).

redress the injury.[52]

B. *Standard of Review*

Affirmative action plans based on race trigger strict judicial scrutiny. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854 (1989); *see also Bakke*, 438 U.S. at 291, 98 S. Ct. at 2748 (Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."). Further, "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260 (1986); *see also Croson*, 488 U.S. at 494, 109 S. Ct. at 722 (reaffirming equal protection analysis is not dependent on the race of those burdened or benefited by a classification).

The defendants contend, however, strict scrutiny is inappropriate in this cause in light of the Supreme Court's holding in *Metro Broadcasting v. FCC*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990). In *Metro Broadcasting*, the Supreme Court held that affirmative action plans adopted pursuant to federal mandates are subject to intermediate scrutiny--a determination whether the plans serve important governmental objectives and whether they are substantially related to the achievement

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[52]Further, the law school's 1992 procedure for review of applicants in the discretionary zone effectively prevents any nonminority candidate from establishing that he or she would have been admitted but for the preference given to minority applicants. *See infra* note 86.

of the objectives. *Id.* at 565, 110 S. Ct. at 3009. The defendants contend that the Texas Plans equate to a federal mandate because they stem from the OCR's insistence on full compliance with Title VI, an objective that is within the power of Congress.[53]

The Court finds the argument unpersuasive. In *Metro*, the FCC's minority ownership programs had been specifically mandated and approved by Congress. *Id.* at 563, 110 S. Ct. at 3008. While it is true that Congress has the power to identify and redress the effects of discrimination and has charged the DOE with assuring compliance with Title VI, there is no similar congressional mandate in this cause. Further, the FCC is a licensing body that, pursuant to a congressional mandate, established specific minority ownership policies. The OCR has provided Texas with a number of suggested tools Texas may implement to bring the higher

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[53]The defendants also contend a suit against the State of Texas or the University of Texas is an impermissible collateral attack on OCR programs and regulations and, in support of this proposition, cite *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954, 111 S. Ct. 2261, 114 L. Ed. 2d 714 (1991). However, in this cause the plaintiffs are not attempting to challenge a federal statute creating minority business set-asides by challenging the State's role in the program. Instead, the plaintiffs in this cause are challenging the specific procedure the law school voluntarily designed and implemented to achieve affirmative action goals suggested by OCR. The constitutionality of the law school's procedure is not dependent on whether the OCR can require affirmative remedies for a Title VI violation. *See Podberesky v. Kirwan*, 764 F. Supp. 364, 374 (D. Md. 1991), *rev'd and remanded*, 956 F.2d 52 (4th Cir. 1992), *on remand*, 838 F. Supp. 1075 (D. Md. 1993).

educational system into compliance with Title VI; it has not, however, required the State to adopt any specific procedures. Although the defendants characterize the law school's efforts as pursuant to an OCR "consent decree," the evidence reflects that, to date, the State of Texas' efforts to comply with Title VI have been made voluntarily in an effort to avoid a specific mandate or the loss of federal funding. Ashworth, vol. 13 at 34, 39.

Further, under equal protection analysis, the same level of scrutiny applies to race-conscious affirmative action plans adopted pursuant to consent agreements as to other voluntarily adopted plans. *See, e.g., In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1501 (11th Cir.1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) (Title VII consent decree). Indeed, the most recent circuit court opinion analyzing an affirmative action plan in the education context, specifically a scholarship plan adopted in response to protracted litigation and OCR guidelines, upheld the lower court's application of strict scrutiny as the proper standard for review of the plan. *See Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992).

The most compelling justification for application of strict scrutiny in this context is to provide assurance that individual rights are afforded the full protection they merit under the Constitution. Only by applying strict scrutiny can a court honestly weigh the validity and necessity of efforts to remedy past wrongs against the rights of otherwise qualified nonminorities affected by the efforts. Although the use of racial classifications is disfavored, there are instances when such classifications serving proper purposes should be upheld. Only through

diligent judicial examination can a court determine if a classification is consistent with constitutional guarantees and not related to "illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493, 109 S. Ct. at 721.

Accordingly, the Court concludes the law school admissions process must be subjected to a strict scrutiny test under the Equal Protection Clause of the Fourteenth Amendment to protect both the integrity of the process and the important individual rights at issue.[54]

C. *Application of Strict Scrutiny*

Strict judicial scrutiny involves a determination of whether the law school process served "a compelling governmental interest" and whether the process is "narrowly tailored to the achievement of that goal." *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 106 S. Ct. 1842, 1847, 90 L.Ed.2d 260 (1986).

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[54]As an additional point, even if the Court were to find intermediate scrutiny to be the proper standard of review, the Court would still be required to assess whether the process imposed undue burdens on nonminorities. *See Metro Broadcasting*, 497 U.S. at 596-97, 110 S. Ct. at 3026 ("[A] congressionally mandated benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose undue burdens on nonminorities."). As discussed infra pp. 575-579, the burden imposed upon nonminorities by the law school's admissions procedure is a very troubling aspect of the process and, ultimately, in this Court's view, renders the process constitutionally impermissible.

The purpose of ascertaining whether a compelling governmental interest exists is to "smoke out" illegitimate uses of race by ensuring that the goal is important enough to use the suspect tool of racial preference. *Croson*, 488 U.S. at 493, 109 S. Ct. at 721. The narrowly tailored analysis "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*

1. Compelling Governmental Interest.--Both sides expended considerable time and effort at trial on the issue of whether a compelling governmental interest existed sufficient to justify the need for the law school's affirmative action program. The defendants offered a number of reasons as justification for the law school's affirmative action program. These reasons are set forth in the law school's "Statement of Policy on Affirmative Action":[55]

> To achieve the School of Law's mission of providing a first class legal education to future leaders of the bench and bar of the state by offering real opportunities for admission to members of the two largest minority groups in Texas, Mexican Americans and African Americans;
>
> To achieve the diversity of background and experience in its student population essential to prepare students for the real world functioning of

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[55]This written articulation of the purposes and policy of the law school's affirmative action program and description of the 1992 process was prepared in February 1994. Johanson, vol. 6 at 45-46; Yudof, vol. 20 at 30-31.

> the law in our diverse nation;
>
> To assist in redressing the decades of educational discrimination to which African Americans and Mexican Americans have been subjected in the public school systems of the State of Texas;
>
> To achieve compliance with the 1983 consent decree entered with the Office of Civil Rights of the Department of Education imposing specific requirement for increased efforts to recruit African American and Mexican American students;
>
> To achieve compliance with the American Bar Association and the American Association of Law Schools standards of commitment to pluralist diversity in the law school's student population.

D-362. Although all are important and laudable goals, the law school's efforts, to be consistent with the Equal Protection Clause, must be limited to seeking the educational benefits that flow from having a diverse student body and to addressing the present effects of past discriminatory practices. *See Bakke*, 438 U.S. at 313; 98 S.Ct. at 2760 (environment fostering robust exchange of ideas makes goal of diversity "of paramount importance in the fulfillment of [a university's] mission"); *United States v. Paradise*, 480 U.S. 149, 167, 107 S. Ct. 1053, 1064, 94 L. Ed. 2d 203 (1987) ("The government unquestionably has a compelling interest in remedying past and present discrimination by a state actor."); *Podberesky*, 956 F.2d at 57 (race-related remedy may be used in attempt to remedy effects of past discrimination). Accordingly, the

Court will evaluate the program in light of these goals.[56]

The plaintiffs do not dispute that under the holding of *Bakke*, obtaining the benefits that flow from a racially and ethnically diverse student body is a compelling interest justifying the use of racial preferences.[57] Nevertheless, the plaintiffs suggest that under more recent Supreme Court decisions, the only compelling interest recognized for race-conscious programs is remedying the past effects of racial discrimination.[58] However, none of

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[56]Notwithstanding the personal views of this judge, it appears the goal of increasing the number of minority members in the legal profession and judiciary of Texas is not a legally sufficient reason to justify racial preferences under fourteenth amendment analysis. *See Croson*, 488 U.S. at 496-98, 109 S. Ct. at 723-24. Further, the desires and goals of a private entity such as the ABA or AALS, though important considerations for an accredited law school, do not provide sufficient justification for racial classifications. Similarly, Texas' "consent decree" with the OCR, though having evidentiary value in terms of past discrimination in Texas' higher education system, is not, in and of itself, a valid justification.

[57]The plaintiffs do contend the law school's affirmative action program is not narrowly tailored to meet the objective of diversity, an issue the Court will address below.

[58]In support of this proposition, the defendants cite *Croson*, 488 U.S. at 493, 109 S. Ct. at 722 ("Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility."), and dissenting opinions from *Metro Broadcasting* and *Johnson v. Transportation Agency, Santa Clara, California*. *See Metro Broadcasting*, 497 U.S. at 613-15, 110 S. Ct. at 3035 (O'Connor, J., dissenting); *Johnson*, 480 U.S. 616,

the recent opinions is factually based in the education context and, therefore, none focuses on the unique role of education in our society.[59] Absent an explicit statement from the Supreme Court overruling *Bakke*, this Court finds, in the context of the law school's admissions process, obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications.

The defendants presented evidence, which included the testimony of deans from law schools across the country and the testimony of former and current law students, that the benefit to the law school educational experience derived from a diverse student population is substantial. *See, e.g.*, Brest, vol. 22 at 22-23; Stein, vol. 18 at 20-21; Bollinger, vol. 16 at 23-26; Spector, vol. 15 at 9-10. Additionally, several professors testified regarding

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673-75, 107 S. Ct. 1442, 1473-1474, 94 L. Ed. 2d 615 (Scalia, J., dissenting).

[59]The Supreme Court recognized the vital role education plays in our society in *Brown v. Board of Education*:

> [Education] is the very foundation of good citizenship. Today it is a principal instrument for awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Educ., 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954).

the educational benefit of having a diverse group of students in the classroom setting. *See, e.g.*, Goode, vol. 9 at 20-21; Yudof, vol. 21 at 59-60.

According to the evidence presented at trial, without affirmative action the law school would not be able to achieve this goal of diversity. Had the law school based its 1992 admissions solely on the applicants' TIs without regard to race or ethnicity, the entering class would have included, at most, nine blacks and eighteen Mexican Americans.[60]

Although under current law the goal of diversity is sufficient by itself to satisfy the compelling governmental interest element of strict scrutiny, the objective of overcoming past effects of discrimination is an equally important goal of the law school's affirmative action program. The plaintiffs have asserted that any past discrimination against blacks occurred so long ago, it has no present effects and that the law school has never discriminated against Mexican Americans.[61] The

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[60]D-441. The Court believes such meager representation would be woefully inadequate in a state university supported, in part, by revenues from all state residents. Further, the Court concurs with the defendants that diversity requires more than token representation of minorities; strict reliance on the TIs for admission would not further the goal of diversity.

[61]The plaintiffs' expert, James Armor, a senior fellow at the Institute of Public Policy, George Mason University, in Fairfax, Virginia, testified there are no present direct effects of past discrimination in Texas' educational system. Armor, vol. 10 at 45-48. Armor testified the only cities in Texas he has visited are Dallas and Houston. Armor, vol. 11 at 41. The Court does

plaintiffs further assert the Court should limit its review of past discrimination to official acts and policy of the University of Texas law school and should not consider discrimination in Texas' educational system as a whole. As support for this contention the plaintiffs cite *Croson*, in which the Supreme Court struck down a city set-aside program that required thirty percent of city contracts to be subcontracted to minority businesses. 488 U.S. at 499, 109 S. Ct. at 724 ("Like the claim that discrimination in primary and secondary school justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.").

Recently, however, the Supreme Court held that a system of higher education is under an affirmative duty to eliminate every vestige of racial segregation and discrimination in its educational system and to reform those policies and practices that required or contributed to separation of the races. *United States v. Fordice*, ___ U.S. ___, ___, 112 S. Ct. 2727, 2743, 120 L. Ed. 2d 575 (1992). Thus, it appears the Supreme Court has recognized that the restrictions it has applied in ascertaining the present effects of past discrimination in the employment context, specifically the prohibition against remedying effects of "societal discrimination" and discrimination implemented by another governmental unit, are not appropriate in the education context. *See also Podberesky v. Kirwan*, 838 F. Supp. 1075, 1098 & n.79 (D. Md. 1993). "Applicants do not arrive at the admissions office of a professional school in a vacuum,"

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not find Armor to be a credible witness.

and, in fact, have ordinarily been students in an educational system for sixteen years. *Geier v. Alexander*, 801 F.2d 799, 809 (6th Cir. 1986).

The Court believes, therefore, the residual effects of past discrimination in a particular component of a state's educational system must be analyzed in the context of the state's educational system as a whole. The State's institutions of higher education are inextricably linked to the primary and secondary schools in the system. Accordingly, this Court has not limited its review to the law school or Texas' higher education system in evaluating the present effects of past discrimination.[62] However, were the Court to limit its review to the University of Texas, the Court would still find a "strong evidentiary basis for concluding that remedial action is necessary." *Podberesky v. Kirwan*, 956 F.2d at 55.

As discussed above, Texas' long history of discrimination against blacks and Mexican Americans in public education is chronicled in court opinions, the findings of the OCR, and the continuing desegregation suits against the State.[63] The State of Texas engaged in

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[62]*See also Ayers v. Allain*, 893 F.2d 732, 751 (5th Cir. 1990): *Brown* states that the stigmatizing effects of segregation are not created by legally compelled attendance but rather from the vestiges of legally compelled separation. Thus the lesson of *Brown* is that the malignancy of apartheid does not vnish in state-sponsored forums simply because attendance is voluntary and admittance race-neutral.

[63]*See, e.g., League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 878, 127 L. Ed. 2d 74 (1994) ("Texas' long history of

overt discrimination against blacks until the practices were forcibly dismantled in the relatively recent past. Discrimination in education was at the center of official discrimination against black Texans. Additionally, the University of Texas has a history of racial discrimination.

Similarly, the State has subjected Mexican Americans to discriminatory practices in the education area as reflected in the findings of unlawful de jure discrimination in the numerous desegregation lawsuits. Less documentation exists of overt official discrimination against Mexican Americans than against blacks at the University of Texas. However, the legacy of Texas' discriminatory practices continues to hinder the University of Texas' efforts to attract qualified Mexican American students.

In recent history, there is no evidence of overt officially sanctioned discrimination at the University of Texas. The evidence reflects that the university has made genuine efforts in the last decade to end discrimination by recruiting and maintaining minority faculty members and students and condemning racial incidents occurring on campus or involving student organizations. Despite these efforts, however, the legacy of the past has left residual effects that persist into the present. The evidence presented at trial indicates those effects include the law school's lingering reputation in the minority community, particularly with prospective students, as a "white" school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile

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discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute . . . .").

environment for minorities.

The univerity's efforts to recruit minorities has led to a modest increase in the number of minorities attending the law school. However, admissions and recruitment personnel face difficulties in attracting qualified minorities to enroll in the law school. These difficulties stem from negative perceptions of the racial climate at the law school as a result of past discrimination.[64] Because of the law school's legacy of discrimination, it must overcome a perception that it is a "white institution." Wright, vol. 19 at 33-34. Recent racial incidents, although not officially sanctioned by the school, have reinforced the perception that the university is hostile to minorities and has hurt its ability to recruit minority students. Wright, vol. 19 at 29-31. An affirmative action program is therefore necessary to recruit minority students because of the past discrimination.

The effects of the State's past de jure segregation in the educational system are reflected in the low enrollment of minorities in professional schools, including the law school. The OCR findings and the OCR's continuing review of Texas' efforts to desegregate demonstrate the pervasive nature of past discrimination in

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[64]Hamilton, vol. 2 at 49-50, 52-53; Wright, vol. 19 at 33-36. *Sweatt v. Painter* is often studied in undergraduate courses and contributes to undergraduate minorities' perception of the University of Texas as an institution that does not welcome minorities. Wright, vol. 19 at 33-36; Romo, vol. 17 at 64.

the higher education system.[65] As a result of policies of official discrimination in the Texas higher education system, a generation of blacks and Mexican Americans who are the parents of those presently of law school age were denied meaningful opportunities for higher education. Glenn, vol. 23 at 51-53; Romo, vol. 17 at 63-64; Wright, vol. 19 at 45-47. The denial of these opportunities to the generation of minority parents bears a causal connection to the diminished educational attainment of the present generation. Glenn, vol. 23 at 51-52; Romo, vol. 17 at 53-54.

Further, many public schools in Texas continued to have a substantial degree of racial and ethnic segregation during the 1970s and 1980s, the decades in which the majority of 1992 law school applicants attended primary and secondary schools. Glenn, vol. 23 at 48-51; D-379. This segregation has handicapped the educational achievement of many minorities. The ultimate effect of the inferior educational opportunity, combined with the lower socioeconomic status of minorities in Texas, is a disproportionately smaller pool of minority applicants to law school. D-379 at 6-7; *see also supra* note 3. In addition, some minority students enrolled in the law school feel isolated even with the current commitment to affirmative action and diversity and are often hesitant to participate in class discussion when they are the sole minority or one of a few minorities in a class. Longoria, vol. 15 at 32-34; Rodriguez, vol. 17 at 24-25. Some

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[65]The plaintiffs contend the OCR's findings are invalid because the OCR did not apply the standards recently set forth by the Supreme Court in *Fordice*. However, neither the validity of the OCR investigation, nor the retroactive application of Fordice is the issue before this Court.

minority students continue to perceive a hostile racial environment on the campus, which they assert is reflected in insensitive comments by fellow students and faculty. Bell, vol. 14 at 16, 29-34; Escobedo, vol. 14 at 41-42; Longoria, vol. 15 at 32-24.

Accordingly, despite the plaintiff's protestations to the contrary, the record provides strong evidence of some present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole. Therefore, the Court finds the remedial purpose of the law school's affirmative action program is a compelling governmental objective.

2. Narrowly Tailored.--The Court must next decide if the admissions process was narrowly tailored to achieve the goals of diversity and overcoming the present effects of past discrimination. This determination requires the application of four factors: the efficacy of alternative remedies; the flexibility and duration of the relief; the relationship of the numerical goals to the percentage of minorities in the relevant population; and the impact of the relief on the rights of third parties. *See United States v. Paradise*, 480 U.S. 149, 171, 107 S. Ct. 1053, 1066, 94 L. Ed. 2d 203 (1987).

The defendants have shown it is not possible to achieve a diverse student body without an affirmative action program that seeks to admit and enroll minority candidates. Brest, vol. 22, at 15. As stated above, in 1992, the entering class would have included at most nine blacks and eighteen Mexican Americans, had the review of minorities been limited to those applicants in the presumptive admit and discretionary zones for white applicants. D-441; Yudof, vol. 21 at 44; Johanson, vol.

6 at 38. These numbers reflect the maximum potential and assume no adverse affect on the number of applicants stemming from the abandonment of affirmative action.

Further, the record indicates the ultimate effect of abandoning affirmative action at the law school would be to rediret minorities to the historically separate state law school at Texas Southern University, thereby resegregating the law school.[66] Alternatives, such as minority scholarships and increased minority recruitment, while effective tools in conjunction with the affirmative action program, would not be effective means by themselves to meet the compelling governmental interests of true diversity and remedying the effect of past de jure segregation. In fact, the record in this case demonstrates that, without affirmative action, the perception of the law school as a "white" institution would be exacerbated, which would compound the difficulties of attracting top minority students. Wright, vol. 19 at 36-37; Goode, vol. 9 at 19; Rodriguez, vol. 17 at 25.

The evidence shows that despite genuine efforts to end discrimination, the legacy of the past continues to

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[66]Ashworth, vol. 12 at 44-45; D-432; D-453; D-454. In 1971, the year following the Board of Regents disapproval of the law school's participation in the CLEO program, the law school entering class had no blacks. As late as 1974 only ten of the law school's 1600 students were black. Wright, vol. 19 at 31-33. Texas Southern University, the law school Texas created to avoid integration of the law school, enrolls almost 50% of all entering minority law students in Texas. This percentage would increase dramatically in the absence of the law school's affirmative action program. Wright, vol. 19 at 21-22; Ashworth, vol. 12 at 44-45; D-432; D-452; D-453.

hinder the law school's efforts to attract highly qualified minority students. Accordingly, the Court finds affirmative action in the law school's admissions program is an effective and necessary means to overcome the legacy of the past and to achieve the diversity necessary for a first-class university.

The plaintiffs argue the admissions program establishes the functional equivalent of an impermissible quota system in which the law school attempts to camouflage quotas through the use of the term "goals." The plaintiffs contend because the admissions committee knows the approximate number of students in an incoming class, the five percent black and ten percent Mexican American figures translate into specific numbers.

The admissions data from the past ten years shows variations in the admission figures for the two groups receiving admissions preferences at the law school-- blacks and Mexican Americans. The data reflects that between 1983 and 1993, the percentage of black admissions varied from a low of 3.2 percent, occurring in 1987, to a high of 9.3 percent in 1983. The percentage in 1992 was 8.0 percent. Mexican American admissions varied from a low of 10 percent, occurring in both 1983 and 1993, and a high of 14.3 percent occurring in 1984. The percentage in 1992 was 10.7.[67]

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[67]The admissions data from 1983 to 1993 reflects the following minority admissions, both in percentages and actual numbers of students:

Year	Black	Mexican American
1983	9.3 (47)	10.0 (51)

An illegal quota, as defined by the Supreme Court, exists when a fixed number of seats are set aside or an unyielding number is set to achieve a goal. *See Bakke*, 438 U.S. at 288, 98 S. Ct. at 2747 (defining quota as fixed number of seats set aside); *see also Metro Broadcasting*, 497 U.S. at 599, 110 S. Ct. at 3027 (equating quota with a "fixed quantity set aside"); *Croson*, 488 U.S. at 499, 109 S. Ct. at 724-25 (describing thirty percent minority set-aside as rigid and unyielding quota); *Fullilove v. Klutznick*, 448 U.S. 448, 498, 100 S. Ct. 2758, 2785, 65 L. Ed. 2d 902 (1980) (equating quota with set-aside).

Though it is evident from the admissions figures that the percentages of desired minorities in a class derived from the OCR investigation served as guidelines, the law school did not rigidly and inflexibly apply the numbers.

Instead, the percentages fluctuate randomly, albeit within a relatively narrow range, and show no consistent pattern of increase. In some years, the law school has failed to meet its goals because of the relatively weak

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1984	6.2 (32)	14.3 (74)
1985	4.6 (25)	11.2 (61)
1986	4.4 (24)	13.1 (71)
1987	3.2 (17)	10.2 (55)
1988	7.0 (44)	10.7 (60)
1989	6.0 (35)	11.4 (58)
1990	7.1 (39)	11.6 (64)
1991	6.9 (35)	10.6 (54)
1992	8.0 (41)	10.7 (55)
1993	5.9 (31)	10.0 (53)

D-71.

strength of the minority applicant pool. Goode, vol. 9 at 13-17. No evidence was presented at trial that the law school granted a set-aside for any particular group or that competition for any specific seat in the class was closed to some students because of race or ethnicity.[68] Accordingly, the Court finds the 1992 admissions process did not use an illegal quota but was, in fact, flexible in achieving its goals based on the strength of the minority applicant pool.

As for duration, the law school has not stated precisely how long it envisions maintaining its affirmative action admissions program. However, in the 1990s, as the minority applicant pool improved, the admissions committee made the decision not to admit greater numbers of minority students but to attempt to close the gap in credentials of minority and nonminority students. Wellborn, vol. 24 at 31-35; Goode, vol. 9 at 7, 17-18. Therefore, in 1992, despite a significant increase in the number of minority applicants from the previous years, the law school's minority admissions remained relatively stable. Johanson, vol. 6 at 13-14; P-47; D-438; D-439.

The current objective of the law school, as articulated at trial, is to continue to narrow the gap to the point where affirmative action will not be required to achieve a representative percentage of minorities in the

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[68]The law school maintains racially segregated "wait lists," which the plaintiffs contend the law school uses to adjust the racial composition of the incoming class to meet its goals. However, the evidence at trial showed that there is no "last seat," as in *Bakke*, for which an applicant's race is the deciding factor. *See, e.g.*, Johanson, vol. 4 at 43.

entering classes.[69] The evidence reflects that the law school admissions committee regularly reviews and adjusts the remedy to evaluate its necessity and efficacy.[70] Certainly, an indefinite program would violate the Equal Protection Clause. However, the law school's use of the program until the OCR has determined Texas is in compliance with Title VI and until the gap in minority and nonminority credentials has narrowed such that the State will remain in compliance with Title VI without the need for affirmative action does not offend the Constitution. *See Podberesky*, 764 F. Supp. at 376.

The third factor, the relationship of the numerical goals to the relevant population, is easily satisfied under these facts. The law school has not attempted to set goals that reflect the percentage of minorities in the general population or the percentage of minorities attending college. Instead the law school's goals for minority enrollment are generally in line with the percentages of black and Mexican American college graduates in the State of Texas. These goals stem from the OCR investigation and the resulting Texas Plans. Goode, vol.

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[69]*See* Goode, vol. 9 at 32 ("My position on the committee for many years has been, we ought to work and strive to decreasing the gap, little by little if we have to, but one day to the point where, in fact, we won't have such a gap, where we can truly have a race-blind system of admission. We're not there."); *see also* Wellborn, vol. 24 at 35; P-1.

[70]The evidence shows that the qualifications of minority applicants today are roughly equivalent to the qualifications of nonminority applicants 20 years ago. D-433. These figures demonstrate the progress that has occurred in the qualifications of minorities applying for law school. Glenn, vol. 23 at 52.

9 at 12-13; Johanson, vol. 4 at 9-12. They are reasonable and logically related to the size of the relevant pool of minority prospects for higher education.

The final factor, the impact of the procedure on the rights of innocent third parties, is the most difficult to evaluate. By definition, if one person is given preferential treatment based on race or ethnicity to overcome a heritage of past societal wrongs, another person is penalized. However, the person penalized or that person's ancestors may never have discriminated against the preferred race or ethnicity. Although the past history of societal discrimination in certain institutions may justify the remedy, in the end, individuals pay the price. Therefore, it is imperative that the mechanics of any program implementing race-based preferences respect and protect the rights of individuals who, ultimately, may have to sacrifice their interests as a remedy for societal wrongs.

In 1992, admissions subcommittees of three reviewed all the nonminority files. With the exception of Johanson and Hamilton, none of the members of the subcommittees reviewed the individual minority files. Nonminority applicants receiving no votes were denied admission without any further consideration or any direct comparison to minority applicants. In fact, as early as February 28, 1992, the law school had sent denial letters to 201 resident applicants, none of whom were black or Mexican American. P-43. By March 24, 1992, 718 denial letters had been sent to resident applicants, all to nonminority applicants. P-52. The law school did not reject any minority applicants until later in the admissions process. P-60. The lack of individual comparison between minority and nonminority files resulted primarily from the separate admissions procedures for minorities

and nonminorities in the discretionary zone; this is the aspect of the procedure that is at issue with respect to the four plaintiffs in this cause, who were evaluated in the discretioary zone. However, the setting of different presumptive denial lines for minorities and nonminorities creates a similar problem: some nonminority applicants who fell below the nonminority presumptive denial line, though having a higher score than minority applicants placed in the discretionary zone, were rejected early in the process with no comparison to the individual minority applicants.[71] Further, although a presumptive denial

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[71]The use of different presumptive admission lines to identify the top candidates in the different groups does not present the same problem for several reasons. First, the evidence shows that Johanson reviewed all candidates in the top category, both minority and nonminority. Additionally, those applicants that were not offered admission from this category were not denied admission but moved to the discretionary zone. Further, Johanson testified to the necessity of making offers of admissions to the top candidates in the minority pools as soon as possible because of the small pool of qualified applicants and the nationwide competition for them. A tool that considers the disparity in past educational opportunity based on historical discrimination to assist in attracting the top minorities does not create an undue burden on the rights of nonminorities when appropriately used. Conversely, the use of differing presumptive denial lines effectively removed some nonminority applicants from consideration early in the process without being provided a general, much less individual, comparison with a fully developed pool of minority applicants. One or two separate reviewers from the general admissions committee unilaterally made determinations with regard to these applicants. However, none of the plaintiffs in this lawsuit was affected directly by this aspect of the 1992 procedure. Further, the new

score was established for minorities, in 1992, every minority applicant not admitted from the presumptive admit category was treated as if in the minority discretionary zone. P-103.

The defendants defend the system used in 1992 as more effective in controlling the use of race for limited, legitimate purposes than the previous procedure of commingling minority and nonminority files in the stacks of thirty, a procedure that allowed individual reviewers complete discretion on the extent, if any, to implement affirmative action. Wellborn, vol. 24 at 8-17. The defendants assert the 1992 process was also more efficient in that minority files were reviewed by the persons most experienced in reviewing and evaluating minority files. Goode, vol. 9 at 3. The defendants concede that in 1992, with the exception of Johanson and Hamilton, no members of the general admissions committee reviewed individual minority files. However, they contend that the full committee was sufficiently apprised of the relative strengths of the minority and nonminority applicant pools through information provided by the minority subcommittee. Because the minority subcommittee shared this information with the full committee, the defendants argue that the full committee could reach a consensus on the weight to give race in the admissions

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admissions procedure adopted by the law school will no longer use presumptive denial lines to preclude comparison of applicants. *See infra* note 87. The Court, therefore, need not address the issue. If the issue were before the Court, the Court would find this aspect of the procedure suffers from the same infirmity that use of the minority subcommittee created in the discretionary zone--lack of individual comparison between minority and nonminority applicants.

process and evaluate the nonminority stacks of files with the relative strengths of the applicant pools in mind. Wellborn, vol. 24 at 10, 14-16; Goode, vol. 9 at 8-9. The defendants also defend the law school's process as consistent with similar processes used at major law schools across the country.[72] However, review of

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[72]The defendants imply that because the law school's affirmative action is fundamentally similar to that used at the major law schools around the country, it is constitutional. The evidence, however, reflects that while there are similarities, the other programs differ significantly from that at issue in this cause. Judith Wegner, Dean of the University of North Carolina School of Law, testified by deposition that the University of North Carolina School of Law does not set separate presumptive admission and denial scores based on race, does not have waiting lists segregated by race, and does not have separate committee review based on race. Wegner depo. at 48-49. Robert Stein, Dean of the University of Minnesota Law School, testified that the University of Minnesota uses mechanisms in the admissions procedure similar in function to those used by the law school. However, all applicants offered admission at the University of Minnesota, with the exception of those offered "automatic" admission based on high indices, are ultimately reviewed by the full admissions committee. Stein, vol. 18 at 12. The minority subcommittee does not have authority to admit applicants, only to recommend specific applicants to the full committee. Stein, vol. 18 at 48. Paul Brest, Dean of the Stanford Law School, testified his school uses a system comparable to that used by the law school, with a single admissions chair who has ultimate discretion on all admissions. Brest, vol. 22 at 19. Instead of a using a minority subcommittee, Stanford has one person that reviews minority files and makes recommendations to the admissions chair. Id. at 8-19. Until recently, that person reviewed only minority files. However, as the result of a recent settlement with OCR, the person began reviewing some

admissions procedures for equal protection violations requires a fact-specific inquiry. The fact that other schools may use processes with similar components does not resolve the issue of whether the defendants deprived the four plaintiffs in this cause of equal protection under the law.

In *Bakke*, Justice Powell stated that although race or ethnicity could be a "plus" factor in consideration of a particular applicant, race or ethnicity should "not insulate the individual from comparison with all other candidates for the available seats." *Bakke*, 438 U.S. at 317, 98 S. Ct. at 2762.

Justice Powell further discussed the importance of assuring applicants that they were treated as individuals in the admissions process:

> The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

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nonminority files so that she would have a better sense of the entire pool of applicants and be able to make more appropriate comparisons between the applicants. *Id.* at 39.

Id. at 318, 98 S. Ct. at 2762. The defendants contend this express language is limited in its application to only those affirmative action programs that, like the one at issue in *Bakke*, use a quota system to achieve diversity. They assert that Justice Powell's reasoning calling for a one-on-one comparison may have application when the primary objective is to obtain a diverse class based on a number of different qualifications. However, this reasoning does not apply, according to the defendants, when a primary objective is to remedy past discrimination. In such circumstances, the defendants maintain individuals need not be compared one-to-one, as long as the admissions committee had a generalized knowledge of the strengths of the minority and nonminority applicant pools.[73] The Court disagrees.

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[73]Additionally, the defendants assert that nothing in the case law following *Bakke* suggests that individual comparison of files is required in an admissions process redressing past discrimination, and in fact, indications exist to the contrary. *See Croson*, 488 U.S. at 519, 109 S. Ct. at 735 (Kennedy, J., concurring) (narrow tailoring standards should not be so strict as to chill state's ability to voluntarily eliminate results of past discriminatory actions); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 471, 106 S. Ct. 3019, 3047-48, 92 L. Ed. 2d 344 (1986) (narrow tailoring does not require specific beneficiaries of affirmative action be victims of past discrimination). The defendants assert that requiring a one-to-one comparison of over 4000 applicants a year would be incredibly burdensome. However, the Court finds no reason, when evaluating affirmative action in the educational context, that the protection afforded individuals under the Fourteenth Amendment should change based on the governmental goal that is to be achieved. Further, the defendants, citing *Bakke*, have asserted diversity as a constitutionally valid goal of the law school's affirmative action program. *Bakke* gives no indication

Overcoming the effects of past discrimination is an important goal for our society. The preservation and protection of individual rights are equally important. Society must be careful not to ignore the latter to achieve the former, for to do so would serve only to perpetuate actions of the type affirmative action attempts to redress. Two wrongs do not make a right; nor does blatant discrimination cure the ills of past discrimination. Indeed, affirmative action that ignores the importance of individual rights may further widen the gap between the races that the law school so diligently attempts to close and create racial hostility. The only proper means of assuring that all important societal interests are met, whether in the context of creating diversity or redressing the ill effects of past wrongs, is to provide a procedure or method by which the qualifications of each individual are evaluated and compared to those of all other individuals in the pool, whether minority or nonminority.

The law school owes a duty to the citizens of Texas to allow access to a legal education to the best qualified applicants. This does not imply that those applicants with the highest numbers or most prestigious pedigrees are necessarily the best qualified. A multitude of factors, as discussed by Justice Powell in *Bakke*, should be considered in developing the best qualified class from a

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that the burden to a school in implementing a constitutionally valid program should be considered as a reason to diminish the need for individual comparison. Additionally, more recent case law has made it clear that administrative convenience cannot support a finding that an affirmative action program is narrowly tailored to remedy the effects of past discrimination. *Croson*, 488 U.S. at 508, 109 S. Ct. at 729-730.

given group of applicants.[74] "Indeed, the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Id.* at 317-18, 98 S. Ct. at 2762. To achieve the compelling governmental goal of remedying past discrimination, race and ethnicity are factors that deserve "pluses" in the weighing of qualifications. To achieve the compelling governmental goal of diversity, nonobjective qualifications of nonminorities and minorities alike may deserve a similar "plus" factor.[75] Only by comparing the entire pool of individual applicants can both these goals be achieved and the best qualified class of entering law students be admitted.

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[74]In addition to race, Justice Powell suggested "[s]uch qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." 438 U.S. at 318, 98 S. Ct. at 2762.

[75]A nonminority applicant from a disadvantaged background, although offered admission to prestigious colleges, who elects to attend less-prestigious schools for economic reasons but nonetheless performs well, seems to be penalized under the current system for not having financial means or opportunities commensurate with other nonminorities dealt a different lot in life. Therefore, the affirmative action program, as applied in 1992, seems to have had the somewhat ironic effect of affecting the rights of less advantaged and, indeed, even disadvantaged, nonminorities rather than the group of nonminorities as a whole.

The law school's 1992 admissions procedure, in theory, was designed to select the best qualified applicants from the thousands of applications it received. In 1992, the law school's affirmative action program involved a determination of those applicants who were the best qualified from the entire minority pool and an attempt to enroll sufficient numbers of those applicants in the entering class to satisfy the compelling governmental objectives at issue. The law school evaluated all nonminority applications through a separate process, with the goal of admitting the best qualified nonminorities.

The defendants maintain this bifurcated process does not violate the Fourteenth Amendment because affirmative action is lawful and those minorities selected are evaluated against nonminority applicants by comparison of the general qualifications of the two pools of applicants. The process, however, incorporates no meaningful evaluation between the applicants selected from each pool--a crucial element for protection of individual rights.

The Court holds that the aspect of the law school's affirmative action program giving minority applicants a "plus" is lawful. But the failure to provide comparative evaluation among all individual applicants in determining which were the best qualified to comprise the class, including appropriate consideration of a "plus" factor, created a procedure in which admission of the best qualified was not assured in 1992. Under the 1992 procedure, the possibility existed that the law school could select a minority, who, even with a "plus" factor, was not as qualified to be a part of the entering class as a nonminority denied admission. Thus, the admission of the nonminority candidate would be solely on the basis of

race or ethnicity and not based on individual comparison and evaluation. This is the aspect of the procedure that is flawed and must be eliminated.

The constitutional infirmity of the 1992 law school admissions procedure, therefore, is not that it gives preferential treatment on the basis of race but that it fails to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race.[76] Because the law school's 1992 admissions process was not narrowly tailored, the Court finds the procedure violated the Equal Protection Clause of the Fourteenth Amendment.

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[76]The record shows that two of the plaintiffs' applications were reviewed by members of the minority subcommittee who had familiarity with both pools of applicants, minority and nonminority. Initially, Johanson reviewed Hopwood's file early in the process before the entire pool of applications had developed. After he moved her to the discretionary zone, a subcommittee of three that included Hamilton reviewed her file. Elliott's file was reviewed by a subcommittee of three that included Johanson. Arguably, because Johanson and Hamilton had familiarity with individual minority applicant files, the procedure as applied to these two plaintiffs was not impermissible. However, because the other reviewers on the subcommittees had no familiarity with individual minority files, the Court finds the constitutional violation applies to all four plaintiffs. Additionally, the fact that these plaintiffs were reviewed by persons familiar with the entire pool was an inadvertent effect of Johanson's and Hamilton's dual roles and the random shuffle of the files into reviewing stacks; it did not result from the design of the procedure.

D. *Effect of Process on Plaintiffs*

The next issue the Court must address is whether, but for the manner in which the law school improperly considered race in its 1992 admissions procedure, the plaintiffs would have been offered admission. The defendants argue that the burden is on the plaintiffs to prove they would have been admitted. The plaintiffs argue that once they prove a constitutional violation, the burden shifts to the defendants to establish there was no but-for causation between the unconstitutional procedure and the denial of admssion to each plaintiff.

Generally, in cases where a plaintiff establishes a constitutional deprivation, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for the action. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 263, 98 S. Ct. 1042, 1052, 55 L. Ed. 2d 252 (1978) (plaintiff seeking damages for due-process violation must show injuries resulted from denial of due process, not from corresponding justifiable deprivation); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977) (once employee established conduct constitutionally protected, burden shifted to employer to show it would have reached same decision).

Justice Powell's opinion in *Bakke* suggests the same holds true in Title VI discrimination suits when evidence of alternative reasons exists.[77] The Supreme Court has

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[77]The trial court in *Bakke* placed the burden of proof on Bakke. Therefore, although the court found the Davis program violated Bakke's fourteenth amendment rights, it denied him injunctive relief because he had failed to prove he would have

recently taken the analysis one step further in the context of Title VII discrimination cases and held that the failure of a defendant to produce credible evidence of legitimate nondiscriminatory reasons is insufficient to support a finding of discrimination because the "ultimate burden of persuasion" remains at all times with the plaintiff. *See St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, ___, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407 (1993). In making this clarification, Justice Scalia stated that a court has no authority to impose liability upon an entity for alleged discriminatory practices unless a factfinder determines, according to proper procedures, that the entity has

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Bakke's situation to that of a plaintiff under Title VII, ruled that because Bakke established the university had discriminated against him, the burden of proof shifted to the university to prove that it would not have admitted him in the absence of the special admissions program. *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152, 1172 (1976). Because the university conceded its inability to carry the burden, the California court ordered Bakke's admission. *Id.* On review, the Supreme Court of the United States noted the burden shift but stated that because the university had not challenged that aspect of the decision, the issue of the proper placement of the burden of proof was not before it for consideration. *Bakke*, 438 U.S. at 280 n.13, 98 S. Ct. at 2743 n.13. At the end of his opinion, Justice Powell, affirming the injunction, noted that remanding the case would serve no useful purpose in light of the university's concession that it could not meet the burden imposed upon it by the burden shift. *Id.* at 320, 98 S. Ct. at 2764. In distinguishing *Bakke* from *Mt. Healthy City Board of Education v. Doyle*, Justice Powell noted that there was no question that race had been the reason for Bakke's rejection and no record existed in *Bakke* that legitimate alternative grounds for the university's decision existed. *Id.* at 320 n.54; 98 S. Ct. at 2764 n.54.

unlawfully discriminated. *Id.* at ___, 113 S. Ct. at 2751. Courts have borrowed the burden of proof standards formulated for Title VII in deciding claims brought under statutes prohibiting discrimination by educational institutions receiving federal funding. *See, e.g., Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1404 (11th Cir. 1993) (Title VI disparate impact claim). *But see Cohen v. Brown Univ.*, 991 F.2d 888, 901-02 (1st Cir. 1993) (Title IX plaintiff bears burden of showing disparity and unmet interest).[78]

The Court finds that the cue in Justice Powell's opinion and the holdings of other constitutional cases suggest that a burden allotment similar to that in Title VII cases is appropriate. Therefore, because the plaintiffs established a prima facie case--they proved the law school's 1992 admissions procedure was constitutionally flawed--the burden shifted to the defendants to establish legitimate grounds for the decision not to admit these plaintiffs, notwithstanding the procedure followed. Unlike the university in *Bakke*, the defendants in this cause did not concede the plaintiffs would have been admitted had their applications been compared on a individual basis to minority files. Instead, they offered legitimate, nondiscriminatory reasons for denying each of the plaintiff's applications. D-332 (Hopwood, Elliott); D-334 (Hopwood, Carvell); D-335 (Carvell, Rogers); D-336 (Carvell). Further, a statistical analysis of the 1992

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[78]The court in *Cohen* held that the burden shift applicable to Title VII cases should not apply to Title IX cases, a statute similar to Title VI. Among the reasons the court offered were the different scope and purpose of the two statutes and the largely aspirational goal of Title IX in comparison to the peremptory goal of Title VII. 991 F.3d at 902.

admissions data supports the defendants' assertion of the non-race based weaknesses in the plaintiffs' applications. D-338 at A-60--A-71.

The plaintiffs placed in evidence a chart created by the law school that depicts the TIs of all 1992 applicants and whether they were offered or denied admission. See P-139. The chart distinguishes minority and nonminority applicants, as well as residents and nonresidents.[79] The chart emphasizes the disparity in TIs between resident minority and nonminority applicants: the highest nonminority TI was 220, the highest black TI was 199 (the same as Hopwood's TI), and the highest Mexican American TI was 208. In the resident nonminority category, of fifty-one applicants with TIs of 199, six were denied admission. Additionally, the law school denied admission to ten nonminorities with TIs higher than Hopwood's TI. With regard to minority applicants with TIs of 199, the chart shows one black applicant, who was] admitted, and three Mexican American applicants, all who were admitted.[80] With regard to a TI of 197, the TI

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[79]The Court has focused on the statistics for residents in this discussion. The Court notes the chart reflects across-the-board higher numbers for nonresidents and correspondingly more difficult thresholds for admittance. On the chart, "D" indicates denied, "A" indicates admitted, and "C" indicates cancelled. For purposes of evaluation of the numbers, applicants in the "C" category are counted as admissions because they were admitted but cancelled the acceptance. *See* Johanson, vol. 6 at 16.

[80]Two of the Mexican American applicants cancelled. On the other end of the scale, out of four black resident applicants with a TI of 185, one was denied admission.

shared by the other three plaintiffs, of fifty-seven resident nonminority applicants, the law school denied admission to nineteen. Only one black resident fell in this category, who was admitted. No Mexican-American applicants had a TI of 197.

However, the law school offered admission to one nonminority resident with the same TI. Applicants with the lowest TI offered admission were all minorities.[81] However, the lowest nonminority TI was only a couple of points higher at 185.

There are many possible methods of evaluating the numbers on the chart and making comparisons of the applicants' relative TIs. The plaintiffs placed the chart in evidence to show their numerical standing above that of the majority of minorities offered admission. The Court agrees with the plaintiffs that the chart shows a significant disparity in TIs between the minority and nonminority pools. But the visual depiction of this disparity further reinforces the Court's finding that the evaluation of applicants must include other nonobjective factors to achieve the compelling governmental interest of overcoming the past effects of discrimination.

What the chart does not prove, however, is that race or ethnic origin was the reason behind the denial of admission to the plaintiffs. Although the plaintiffs had higher TIs than the majority of minority applicants offered admission, the evidence shows that 109 nonminority residents with TIs lower than Hopwood's

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[81]Of five black applicants with a TI of 183, the law school admitted three; of eleven Mexican American applicants, the law school admitted two (one cancelled).

were offered admission.[82] Sixty-seven nonminority residents with TIs lower than the other three plaintiffs were admitted.[83]

Additionally, the Court has reviewed the files of the four plaintiffs as well as the files placed in evidence of other applicants reviewed in the discretionary zone, both minority and nonminority. P-146 to P-150, P-155 to P-164 (white applicants admitted); P-224 to P-237 (black and Mexican American applicants admitted). Based on the applications in evidence, it appears the majority of applicants, both minority and nonminority, made considerable effort to inform the admissions committee of their special qualifications through extensive answers to the questions on the application form or through personal statements. See P-146 to P-150, P-155 to P-163, P-225 to P-237. Most files contained one, if not several, letters of recommendation. See, e.g., P-155, 157, 158, 161, 225, 231, 233-236. In fact, of all the applications the Court reviewed, Hopwood's provides the least information about her background and individual qualifications and is the least impressive in appearance, despite her relatively high numbers. The files further reveal that both minorities and nonminorities were offered admission from the waiting lists. See P-146, 148, 156, 158, 162 (nonminority); P-231, 285 (minority).

In reviewing these files, the Court appreciates the difficulty of the task facing the admissions committee each year. Evaluation of applications involves both objective and subjective factors, and the Court is aware that some

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[82]Twenty-nine of these applicants canceled.

[83]Thirteen of these applicants canceled.

evaluators could use subjectivity to conceal discriminatory motives. As a general rule, however, judges are not as well suited to evaluate qualifications of applicants as those who are familiar with the process and have many years of experience evaluating applications. *See Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993). The Court's review revealed a group of applicants with varying backgrounds and accomplishments, but none so clearly better qualified, in the Court's view, as to require that individual's selection over that of another in the group.[84] The Court sees no disparities in the applications of the admitted minorities when compared to those of the plaintiffs "so apparent as virtually to jump off the page and slap [the Court] in the face." *Id.* Without such a disparity, the Court cannot and will not substitute its views for those of admission committee members with years of experience and expertise in evaluating the law school applications. *See id.*

Therefore, the Court finds the defendants have met the burden of producing credible evidence that legitimate, nondiscriminatory grounds exist for the law school's denial of admission to each of the four plaintiffs and that, in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process. The plaintiffs, who maintain the ultimate burden

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[84]The Court notes that several of the applicants, some of which, in the Court's opinion, were weaker candidates, initially were denied admission but offered a position on the waiting list. They were offered admission relatively late in the process from the waiting list.

of persuasion, have failed to prove otherwise.[85] The Court simply cannot find from a preponderance of the evidence that the plaintiffs would have been offered admission under a constitutional system.

The Court is mindful that the ultimate burden on the plaintiffs is a difficult and, perhaps, almost impossible obstacle to overcome in a case of this nature.[86]

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[85]In this cause, the plaintiffs' initial position was that any consideration of race in an admissions procedure is improper. Upon the Court's indication that such a position was untenable under the law, the plaintiffs redirected their efforts to proving the law school improperly used race in the admissions process. However, the plaintiffs' causation evidence consisted of a demonstration that many more minority students were admitted in 1992 than would have been under a strictly race-blind process and that, had the plaintiffs been minorities, there was a high probability they would have been offered admission. Johanson, vol. 5 at 37; vol. 6 at 18-19. This evidence, although proof of affirmative action, does not establish that the plaintiffs, who are not minorities, would have received sufficient votes to be offered admission if individual minority files had been reviewed by the general admissions committee.

[86]In closing argument, the plaintiffs' counsel stated the plaintiffs could not prove they were denied admission because of their race because it was an impossible burden to meet. T. Smith, vol. 26 at 11, 40. Justice Souter, in expressing concern for Title VII plaintiffs with similar burdens, criticized the holding in *St. Mary's* as establishing a scheme, which, as a practical matter, could never be met by a plaintiff without direct evidence of discrimination. *St. Mary's*, ___ U.S. at ___, 113 S. Ct. at 2761 (Souter, J., dissenting). The Court agrees that the plaintiffs have an impossible burden absent direct

However, the Court may not ignore the precedent of other constitutional cases because, as a practical matter, the burden may be too difficult for plaintiffs to overcome.

E. *Relief and Damages*

The plaintiffs seek declaratory and injunctive relief, as well as compensatory and exemplary damages. Because the Court has found the admission procedure the law school used in 1992 was not narrowly tailored in that it impermissibly and unnecessarily harmed the rights of the plaintiffs, the Court will enter a judgment providing the plaintiffs with their requested declaratory relief. Specifically, the Court will enter judgment that the law school's use of the separate evaluative processes for minority and nonminority applicants in the discretionary zone violated the Fourteenth Amendment.

However, "the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739, 104 S. Ct. 1387, 1395, 79 L. Ed. 2d 646 (1984). As discussed above, the Court cannot find from a preponderance of the evidence that the plaintiffs would have been admitted under a constitutional system. The Court, therefore, will not order injunctive relief. Nor does the Court find

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evidence. However, the difficulty does not stem from the unconstitutional aspects of the procedure alone but from the random shuffle of files into stacks of thirty, with each stack reviewed by different subcommittees of three. Under such a system, it is virtually impossible to establish the outcome of a comparison of the plaintiffs' applications against the other applicants, whether minority or nonminority.

prospective injunctive relief necessary in light of the law school's voluntary change to a procedure, which on paper and from the testimony, appears to remedy the defects the Court has found in the 1992 procedure.[87] Further, neither a plaintiff denied admission under the new system nor evidence of the practical application of the new procedure is before this Court.

Although the plaintiffs have failed to prove an injury-in-fact, they have proved they were deprived of their right to equal treatment. The appropriate relief for a denial of equal treatent in a discriminatory government program is a remedy mandating equal treatment.[88] Therefore, the Court finds it appropriate to allow the plaintiffs to reapply to the law school for admission in the 1995 entering class, if they so desire, without requiring them to incur further administrative costs, and for them

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[87]The law school followed the admissions procedure used in 1992 in 1993 and 1994. However, for selecting the 1995 entering class, the law school has established a new procedure that eliminates the minority subcommittee. D-363. All admissions decisions will be made by a small "administrative admissions group," which will be comprised of Johanson, Hamilton's successor, Dean Tonya Brown, and a faculty member who, as of the trial date, had not been selected. The new procedure will not use presumptive admission and denial scores. Johanson, vol. 6 at 34. The law school changed its procedure because "when one gets sued in federal court it catches one's attention." *Id.* at 57.

[88]*See Heckler*, 465 U.S. at 740, 104 S. Ct. at 1395. This remedy may be accommodated by an end to preferential treatment of others. *Id.* at n.8. In the context of affirmative action, the Court interprets this to mean an end to unlawful preferential treatment of others.

to be fairly evaluated in comparison to all other applicants for admission in 1995.[89]

In addition, though the plaintiffs did not prove they suffered any other actual injury, the Court will not ignore the gravity of the noneconomic injury to persons denied equal treatment. Therefore, although normally assessed in the context of procedural due-process violations, the Court believes this to be an appropriate case for the assessment of nominal damages:

> By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. at 266, 98 S. Ct. at 1054. The Court, therefore, will award each plaintiff nominal damages of one dollar.

With regard to general monetary damages, the evidence at trial consisted of each plaintiff's testimony and

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[89]Because plaintiff Carvell has taken advantage of the opportunity to obtain a legal education at SMU, this aspect of the remedy may have little value to him. Carvell, in all probability, will be a practicing member of the bar long before the other plaintiffs, if offered admission to the law school under a constitutional admissions procedure, obtain law degrees.

speculation about the value of a law degree.[90] Because the plaintiffs have failed to establish that they would have been admitted under a constitutional system, they are not entitled to these damages. Further, had the plantiffs been entitled to damages, none of them established monetary damages as required under the law and rules of this circuit. *See Haley v. Pan American World Airways*, 746 F.2d 311, 316 (5th Cir. 1984) ("A damage award cannot stand when the only evidence to support it is speculative or purely conjectural."). Finally, the Court would not award Title VI damages even were such damages appropriate because the Court does not believe the defendants intended to discriminate against the plaintiffs in an unlawful manner. *See Carter v. Orleans Parish Pub. Schs.*, 725 F.2d 261, 264 (5th Cir. 1984) (recovery of damages under Title VI precluded unless action intentional or manifested discriminatory animus); *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356-57 (5th Cir. 1983) (same). Indeed, the evidence reflects the contrary. The defendants acted in good faith and made sincere efforts to follow federal guidelines and to redress past discrimination. The record contains no evidence that the defendants intended to discriminate against or to harm the plaintiffs. Under these facts, an award of damages, especially the punitive damages the plaintiffs request, would be inappropriate.

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[90]Elliott testified he thought the median income for recent law school graduates was $57,000 per year. Elliott, vol. 7 at 30. Rogers had a somewhat less inflated concept, testifying the average first-year salary for a graduate from the law school was $52,000. Rogers also testified that the defendants had "taken the top off my career" and requested some amount he could not quantify to compensate him for the loss. Rogers, vol. 11 at 67.

V. CONCLUSION

It is regrettable that affirmative action programs are still needed in our society. However, until society sufficiently overcomes the effects of its lengthy history of pervasive racism, affirmative action is a necessity. Further, although no one likes employing racial classifications and distinctions, "it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful." *Bakke*, 438 U.S. at 407, 98 S. Ct. at 2808 (Blackmun, J., concurring in part and dissenting in part).

Commitment to affirmative action programs in educational institutions as just and necessary, however, does not imply that the individual rights of nonminorities should fall by the wayside or be ignored. The concern for individual rights requires that programs implementing racial and ethnic preferences be subjected to the most searching judicial examination of strict scrutiny. Only by applying strict scrutiny can the judicial branch assure society that the important individual rights protected by the Fourteenth Amendment have not been unnecessarily and unfairly burdened solely as a function of the color of an individual's skin. The judicial branch must carefully and honestly assess the harm to those individual rights in light of the compelling interests served and benefit bestowed upon society by the affirmative action program. To do otherwise would do little more than, in the words of Justice Kennedy, move us from "separate but equal" to "unequal but benign." *Metro Broadcasting*, 497 U.S. at 638, 110 S. Ct. at 3047 (Kennedy, J., dissenting).

Further, if we wish to progress to a society in which affirmative action is no longer necessary, we must

be cognizant of pitfalls and dangers created by affirmative action in the form of the stigma some associate with racial preferences and the potential institutionalization of a process that was designed to overcome institutionalized discrimination. The interests of all require that the government not diminish the importance of individual rights, whether belonging to a minority citizen or a nonminority citizen, through programs, that although well-intentioned, unwittingly "permit the seeds of race hate to be planted under sanction of law." *Plessy v. Ferguson*, 163 U.S. 537, 560, 16 S. Ct. 1138, 1147, 41 L. Ed. 256 (1896) (Harlan, J., dissenting).

The Court realizes that some individuals will continue to complain that any admissions program employing preferences based on race, no matter how carefully designed and administered to provide individualized consideration, deprives nonminorities of their rights. However, when the program functions to overcome the effects of years of discrimination and to serve important societal goals, affirmative action "is consistent with equal protection principles as long as it does not impose undue burdens on nonminorities." *Metro Broadcasting*, 497 U.S. at 597, 110 S. Ct. at 3026. The Court believes the only way of assuring an undue burden is not placed on innocent parties in an admissions procedure is to treat all applicants as individuals and to consider all qualifications in selecting the best qualified candidates to comprise an entering class. Using the color of an applicant's skin to limit the degree of individual comparison between the races neither serves societal goals

nor sufficiently protects individual rights under our Constitution.[91]

Judgment will be issued consistent with the Court's findings in this opinion.

FINAL JUDGMENT

BE IT REMEMBERED on the 19th day of August 1994, the Court entered its memorandum opinion consisting of its findings of fact and conclusions of law in the above-captioned matter and, consistent with those findings and conclusions, enters the following judgment:

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> "The hand that rounded Peter's dome,/
> And groined the aisles of Christian Rome,/
> Wrought in a sad sincerity./
> He builded better than he knew!"

Those who devised the Fourteenth Amendment wrought in grave sincerity. They may have builded better than they knew. They vitalized and energized a principle, as old and as everlasting as human rights. To some of them, the sunset of life may have given mystical lore. They builded, not for a day, but for all time; not for a few, or for a race; but for man. They planted in the Constitution a monumental truth . . . the golden rule.

Roscoe Conkling, Oral Argument in *County of San Mateo v. Southern Pacific R.R.*, 116 U.S. 138, 6 S. Ct. 317, 29 L. Ed. 589 (1885), in *Oral Argument on Behalf of Defendant by Roscoe Conkling* 34 (1883).

IT IS ORDERED, ADJUDGED, and DECREED, by declaratory judgment, that the 1992 admissions procedure of the law school at the University of Texas at Austin, as administered, was in violation of the 14th Amendment of the United States Constitution;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Cheryl J. Hopwood, Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers shall be entitled to reapply for admission to the law school at the University of Texas at Austin for the 1995-96 school year without further administrative expense or fees and that their applications shall be reviewed by the admissions committee of the law school at the University of Texas at Austin along with all other applications for that school year;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Cheryl J. Hopwood, Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers do have and recover judgment of and against the defendants University of Texas at Austin and the University of Texas School of Law, jointly and severally, in the total amount of One Dollar ($1.00) each;

IT IS FINALLY, ORDERED, ADJUDGED, and DECREED that all further affirmative relief requested by any party herein against any other party herein is DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTING DIVISION

CHERYL J. HOPWOOD,	§	
DOUGLAS CARVELL,	§	
KENNETH ELLIOTT, and	§	
DAVID RODGERS,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL NO.**
v.	§	**A-92-CA-563-SS**
	§	
STATE OF TEXAS and	§	
REGENTS OF THE	§	
UNIVERSITY OF TEXAS	§	
SYSTEM,	§	
	§	
Defendants,	§	

O R D E R

Before the Court is the Thurgood Marshall Legal Society and Black Pre-Law Association's Renewed Motion for Intervention for the Limited Purpose of Allowing Evidence on the Issue of the Predictive Validity of the Texas Index. The Court, having reviewed the motion, enters the following order:

IT IS ORDERED that the Thurgood Marshall Legal Society and Black Pre-Law Association's Renewed Motion for Intervention for the Limited Purpose of Allowing Evidence on the Issue of the Predictive Validity of the Texas Index is DENIED.

SIGNED this the 15th day of July 1994.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

Cheryl J. HOPWOOD, Douglas Carvell, Kenneth Elliott, and David Rogers,
Plaintiffs,
v.
STATE OF TEXAS and Regents of the University of Texas System, Defendants.

Civ. No. A-92-CA-563-SS.

United States District Court, W.D. Texas, Austin Division.

Jan. 20, 1994.

ORDER

SPARKS, District Judge.

Before the Court is the Motion of Thurgood Marshall Legal Society and Black Pre-Law Association to Intervene as Defendants.[1] The Court, having reviewed

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[1]The Thurgood Marshall Legal Society, a chapter of the National Black Law Students Association, is a recognized student organization at the University of Texas School of Law. Its membership is comprised of law students, predominantly African-American, currently in attendance at the law school. One of the goals of the organization, according to the affidavit of the organization's current president, is to encourage the admission of greater numbers of African-American students to the law school.

The Black Pre-Law Association, an organization of African-American undergraduate students currently attending the University of Texas, is comprised of students who have

the motion, accompanying brief and documents, and the parties' responses, concludes the motion should be denied.[2]

This is a lawsuit in which four individuals contend they were denied admission to the University of Texas School of Law because of a racially discriminatory admission policy. The initial lawsuit was filed in September 1992. A somewhat lengthy and strongly argued debate on the issues of standing and ripeness soon ensued, which culminated in this Court's denial of the Defendants' motions for summary judgment by order dated October 28, 1993. In November 1993, because of some confusion by the parties regarding the posture of the cause and because of the Court's concern with efficiently moving the cause to trial, the Court set deadlines for pleading and motion filings, as well as for discovery. Of consequence to the motion now before the Court are the deadlines of March 11, 1994, for a final pretrial status conference to address pretrial issues and set a trial date; of April 1, 1994, for the completion of discovery; and of April 15, 1994, for a joint pretrial order to be filed. Now, with only a little over two months to go before the completion of discovery, which has already been a contentious process and evidently involves a multitude of documents, two new entities wish to become parties to the litigation.

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applied or who may apply to law school. A central goal of the organization, according to the affidavit of the current president, is to promote African-American students' interest in the law and to assist them in the application and admission process.

[2]Not surprisingly, the Plaintiffs are opposed to the intervention; the Defendants are not.

The prospective intervenors seek intervention both under Federal Rule of Civil Procedure 24(a), which provides for intervention as a matter of right, and under Federal Rule of Civil Procedure 24(b), which provides for permissive intervention. In seeking intervention, the prospective intervenors basically claim they have a substantial interest in protecting the law school's affirmative-action admissions program that will not be adequately protected the Defendants.

For intervention under Rule 24(a), the movant must meet the following requirements: (1) the motion must be timely; (2) the movant must have an interest relating to the transaction that is the subject of the ongoing action; (3) the movant must be so situated that the disposition of the action may impair or impede the movant's ability to protect its interest in the litigation; and (4) the movant's interest is not adequately represented by the existing parties to the litigation. *See* FED. R. CIV. P. 24(a); *Bush v. Viterna*, 740 F.2d 350, 354 (5th Cir. 1984). If a prospective intervenor fails to meet any one of the requirements, it cannot intervene as a matter of right. *Bush*, 740 F.2d at 354.

The prospective intervenors contend their specific interest in promoting the legal education for African Americans is not adequately represented by the Defendants, who have historically acted in a manner adverse to the interests of the proposed intervenors. However, as a practical matter, the prospective intervenors and the Defendants have the same ultimate objective in this lawsuit--the preservation of the admissions policy and procedure currently used by the law school.

When a prospective intervenor "has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance." *Id.* at 355 (citation omitted). While the presumption of adequate representation may be rebutted on a relatively minimal showing, the prospective intervenors must "produce something more than speculation as to the purported inadequacy." *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). Further, the potential obstruction and delay that may be caused by allowing intervention fully justifies a requirement that a clear showing rather than a mere allegation that prospective intervenors' interests will not be adequately represented by an existing party be made. *United States v. Int'l Tel & Tel. Corp.*, 349 F. Supp. 22, 27 n.4 (D.C. Conn. 1972), *aff'd sub nom. Nader v. United States*, 410 U.S. 919 (1973).

The Court finds the prospective intervenors have not overcome the presumption of adequate representation. Further, the Defendants have demonstrated they have sufficient motivation and ability to defend vigorously the current admissions policy. Because this Court finds the prospective intervenors have failed to overcome the fourth test for intervention, inadequate representation by the Defendants, the prospective intervenors are not entitled to intervene as a matter of right.

In making a determination of whether to allow permissive intervention under Rule 24(b), a court must determine if three conditions are met: (1) the movant

must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim or defense and the main action must have a question of law or fact in common. *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989), *aff'd sub nom. Venegas v. Mitchell*, 495 U.S. 82 (1990).

Additionally, a court must consider whether the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." *See* FED. R. CIV. P. 24(b).

The prospective intervenors contend that, because they seek to raise defenses sharing common factual and legal questions with the main action, they are entitled to permissive intervention. However, the exitence of a common question of law or fact will not automatically entitle a movant to intervene; the district court has the discretion to determine the fairest and most efficient method of handling the lawsuit. *Venegas*, 867 F.2d at 530; *see also Bush*, 740 F.2d at 354 (permissive intervention wholly discretionary even if common question of law or fact or requirements of Rule 24(b) otherwise satisfied). Further, as discussed above, the Court has found the interests of the prospective intervenors are adequately represented by the Defendants; adding the prospective intervenors as defendants at this juncture in the lawsuit would needlessly increase cost and delay disposition of the litigation.[3] Accordingly, the Court enters the following order:

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[3]The Court believes the appropriate role for the prospective intervenors, if any, in this lawsuit is as amicus curiae. However, the prospective intervenors have not requested amicus curiae status.

IT IS ORDERED that the Motion of Thurgood Marshall Legal Society and Black Pre-Law Association to Intervene as Defendants is DENIED without prejudice to seeking leave to participate as *amicus curiae*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-50569

CHERYL J. HOPWOOD, et al.,

Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, et al.,

Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY
and
BLACK PRE-LAW ASSOCIATION,

Movants-Appellants.

DOUGLAS CARVELL, et al.,

Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, et al.,

Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY
and
BLACK PRE-LAW ASSOCIATION,

Movants-Appellants.

NO. 94-50664

CHERYL J. HOPWOOD, et al.,

Plaintiffs,

CHERYL J. HOPWOOD, et al.,

Plaintiffs-Appellants,

VERSUS

STATE OF TEXAS, et al.,

Defendants-Appellees.

Douglas Carvell, et al.,

Plaintiffs,

DOUGLAS CARVELL,

Plaintiff-Appellant,

VERSUS

STATE OF TEXAS, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion March 18, 1996,
1996 WL 120235 (5th Cir.))

Before SMITH, WIENER, and DeMOSS, Circuit Judges.[1]

PER CURIAM:

In No. 94-50569, treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of the members of the court, and a majority of the judges in regular active service not having voted in favor (*see* FED. R. APP. P. 35 and 5TH CIR. R. 35), the suggestion for rehearing en banc is DENIED.

In No. 94-50664, the court having been polled, at the request of one of the members of the court, on the reconsideration of this cause en banc, and a majority of the judges in regular active service not having voted in favor, rehearing en banc is DENIED.

A dissent from the denial of rehearing en banc is forthcoming and is to be published.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith [April 4, 1996]
United States Circuit Judge

POLITZ, Chief Judge, and KING, WIENER, BENAVIDES, STEWART, PARKER, and DENNIS,

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[1]Judge Emilio M. Garza did not participate in this decision.

Circuit Judges, dissenting from failure to grant rehearing en banc

> Soon after the founding of the Republic, the Supreme Court indicated that the power of judicial review should be exercised reluctantly, only because it is essential to the decision of the case before a federal court and because the Constitution and the laws of the United States, as the "Supreme law of the Land," require it.[1]

This case was brought by four individual plaintiffs (not a class of plaintiffs) who were denied admission to the University of Texas Law School (Law School) in 1992, claiming that the Law School's admission process in 1992 violated the Fourteenth Amendment by giving race-based preferences exclusively to blacks and Mexican Americans.[2] In resolving the case presented by these four plaintiffs, the panel opinion directed the Law School not to use race as a factor in the admissions process at all.[3] In so doing, the opinion goes out of its way to break ground that the Supreme Court itself has been careful to avoid and purports to overrule a Supreme Court decision,

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[1]*Baker v. Wade*, 769 F.2d 289, 298 (5th Cir. 1985) (Goldberg, J., dissenting) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 4 L. Ed. 97 (1816)).

[2]The Law School no longer employs the system that was in place for 1992.

[3]Judge Smith wrote the opinion for the panel, and Judge DeMoss joined that opinion in full. Judge Wiener, who wrote separately, did not join the panel opinion in this conclusion.

namely, *Regents of the University of California v. Bakke*.[4] The radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation. A case of such monumental import demands the attention of more than a divided panel. It should have the attention of every active judge on this court. We respectfully but emphatically dissent from the denial of rehearing en banc.

For reasons that have not been communicated to this court, and upon which we can only speculate, neither the plaintiffs nor the defendants have sought rehearing en banc. It would appear that in this case, some of our colleagues may have embraced the rationale that, when sophisticated litigants represented by capable lawyers elect not to seek rehearing en banc, it is not our place to take any action. Our customary practice, however, does not support this position. Indeed, not infrequently we proposed rehearing en banc on our own motion, before the parties have requested that we do so. We reject out of hand the notion that we are merely obsequious ciphers, subject to the tactical decisions and strategic maneuvers of the litigants before us. When the occasional case of such far-reaching importance to this court, to public higher education, and to this nation comes down the pike, we have a duty to address it and to do the best possible job that *our whole court* is capable of, regardless of the tactical decisions of the litigants. To decline to rehear a case of this magnitude because the parties have not suggested that we do so bespeaks an abdication of duty--

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[4]438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

the ducking of a tough question by judges who we know first-hand are made of sterner stuff.

The label "judicial activism" is usually found in the lexicon of those voicing concern about judges whom they perceive to be "liberal," fashioning remedies beyond the scope of what is deemed to be appropriate under the law. Such judicial legislating is generally excoriated as a "bad thing." *Hopwood v. State of Texas*[5] is a text book example of judicial activism. Here, two members of the three-judge panel determined to bar *any* consideration of race in the Law School's admission process. This "injunction" is wholly unnecessary to the disposition of the matter appealed and thus is clearly dictum; yet dictum that is a frontal assault on contrary Supreme Court precedent and thus not the kind of dictum we can ignore. By tenuously stringing together pieces and shards of recent Supreme Court opinions that have dealt with race in such diverse settings as minority set asides for government contractors, broadcast licenses, redistricting, and the like, the panel creates a gossamer chain which it proffers as a justification for overruling *Bakke*. We are persuaded that this alone makes the instant case not just en banc-worthy but en banc mandatory.

The Supreme Court has left no doubt that as a constitutionally inferior court, we are compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it.[6] We may not reject, dismiss, disregard, or

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[5] ___ F.3d ___ (1996 WL 120235) (5th Cir. 1996).

[6] *See Rodriguez v. Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

deny Supreme Court precedent, even if, in a particular case, it seems pellucidly clear to litigants, lawyers, and lower court judges alike that, given the opportunity, the Supreme Court would overrule its precedent.

Members of this court have frequently "preached" against such judicial activism. In *Williams v. Whitley*,[7] Judge Higginbotham explained the limits placed on appellate courts regarding Supreme Court precedent:

> [A]bsent clear indications from the Supreme Court itself, lower courts should not lightly assume that a prior decision has been overruled sub silentio merely because its reasoning and result appear inconsistent with later cases. As [the district court] pointed out . . . the Court issued a reminder to this effect only a few years ago in *Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989): "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Id.* at 484-85, 109 S. Ct. at 1921-22; see also id. at 486, 109 S. Ct. at 1923 (Brennan, J., dissenting) (describing anticipatory overruling as "an indefensible brand of judicial activism") . . . In these circumstances, *our role as an inferior court counsels restraint, even if the result otherwise appears inescapable.*

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[7]994 F.2d 226, 235 (5th Cir. 1993).

In like manner, our colleagues have routinely counseled that judicial restraint is the order of the day, especially in the constitutional context. For example, in *Walton v. Alexander*,[8] Judge Garwood insisted that courts have a duty not to address constitutional issues not necessary to the disposition of an individual case.

> [I]t is settled that courts have a "strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154, 99 S. Ct. 2213, 2223, 60 L. Ed. 2d 777 (1979). This "responsibility to avoid unnecessary constitutional adjudication" is "a fundamental rule of judicial restraint." *Three Affiliated Tribes v. World Engineering*, 467 U.S. 138, 157, 104 S. Ct. 2267, 2279, 81 L. Ed. [2d] 113 (1984). All this, of course, applies not only to the Supreme Court but to lower courts as well. *See Bowen v. United States*, 422 U.S. 916, 920, 95 S. Ct. 2569, 2573, 45 L. Ed. [2d] 641 (1975).

Variations of this theme can be found in the opinions of many of the judges of this court.[9]

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[8] 20 F.3d 1350, 1356 (5th Cir. 1994). We cannot but note that a majority of our active judges voted *Walton* en banc to correct the majority's erroneous interpretation of Supreme Court precedent regarding an issue that was not necessary for the resolution of the case.

[9] *See also United States v. Mendiola*, 42 F.2d 259, 260 n.1 (5th Cir. 1994) (Barksdale, J.) ("It goes without saying that we have a strong duty to avoid constitutional issues that need not

Thus, it seems that this court has trouble practicing what it preaches, at least in this instance. For here, Justice Powell's opinion in *Bakke* made the Supreme Court's disposition precedential.[10] We unequivocally reject the proposition that it does not mandate our

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be resolved in order to determine the rights of the parties to the case under consideration."); *Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989) (Smith, J.) ("Principles of judicial restraint dictate that if resolution of an issue effectively dispose[s] of a case, we should resolve the case on that basis without reaching any other issues that might be presented."); *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1175 (5th Cir. 1993) (Jolly, J.) ("The judicial power to adjudicate constitutional questions is reserved for those instances in which it is *necessary* for the vindication of individual rights.") (emphasis added); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d F.3d 443 (5th Cir. 1994) (Jones, J., dissenting, joined by Garwood, Smith, Barksdale and DeMoss, JJ.) ("'The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in [the constitutional] field.'") (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261 (1992)).

[10]In a part V.C. of his opinion, Justice Powell writes,

> In enjoining [the University of California at Davis] from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.

Bakke, 438 U.S. at 318. Justices Brennan, White, Marshall, and Blackmun joined Justice Powell in this holding. *Id.* at 271 n.*.

disposition. The syllogisms tacked together and proffered by the majority opinion as proof that Justice Powell's diversity conclusion is no longer good law do not, under any standards of which we are aware, qualify as an overruling of *Bakke*.[11] To the contrary, direct reference to Justice Powell's diversity analysis documents, supports, and reinforces its continuing validity.[12] Consequently, even if the members of the panel majority were convinced that the Supreme Court is certain to overrule *Bakke*, in the absence of an express overruling, they had no option but to grin, follow *Bakke*, bear it, and patiently await the Supreme Court's reconsideration. Rather than following this universally recognized canon, adhering to our established rules, and applying Supreme Court precedent, the panel charted a path into terra incognita. Judicial self-restraint was the first casualty; it proved to be too burdensome. The teachings proscribing the consideration of constitutional issues unnecessary to the decision soon followed. With these two limitations adroitly set aside, the panel majority apparently considered itself positioned to overrule *Bakke*.

Giving the panel majority the benefit of the doubt, as we are wont to do and should do, and assuming arguendo that *Bakke*'s diversity issue had to be addressed in this particular case, would it not have been the more

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[11]Lest there be any doubt, we are firmly convinced that, until the Supreme Court expressly overrules *Bakke*, student body diversity *is* a compelling governmental interest for the purposes of strict scrutiny.

[12]*See Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (recognizing racial diversity as sufficiently compelling in the context of higher education).

judicious course to have brought our full en banc powers to bear on this difficult, vitally important question? It can hardly be gainsaid that reasonable jurists can and likely will differ on an issue of such magnitude, depth, and importance. Indeed, this very truism compels giving to the entire court the opportunity to devote to this crucial case its focused consideration. Conceivably, after an en banc rehearing the panel result, its reasoning, and even its dicta, might be embraced by a majority of the en banc court. But that is not the point; even if that unprecedented and, we suggest, impertinent step--a federal circuit court, sitting en banc, purporting to overrule a Supreme Court precedent--were to be taken, it would not be taken until sixteen of the seventeen active judges of this court[13] had an opportunity to consider and participate in the deliberations on this matter fully.

There are many things which a "yea" vote on an en banc poll is not: It is not necessarily a vote against the analysis; it is not necessarily a vote against the result; it is not necessarily a vote against a panel opinion or in favor of a special concurrence or a dissent. It is rather an affirmative statement that, for one or more reasons, a case or an issue is worthy of the time, attention, and efforts of the entire court. *Hopwood* is such a case. Unfortunately, a bare majority of our colleagues have joined hands to deny this storied court the opportunity to consider this case en banc.

The majority of the panel overruled *Bakke*, wrote far too broadly, and spoke a plethora of unfortunate

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[13]Judge Emilio M. Garza, our seventeenth active judge, recused himself from the outset.

dicta. That was not their prerogative, yet this court declined to reconsider *Hopwood* en banc. From that decision we must, perforce, dissent.

Stewart, Circuit Judge, dissenting from failure to grant rehearing en banc.

I wholeheartedly concur in the dissent to the denial of en banc rehearing. I write separately to underscore the lack of historical perspective and sensitivity in both the panel majority's opinion and the vote not to consider this case en banc.

That it is the University of Texas School of Law's admissions policy at issue is a fact whose significance has not been lost on any of us. In 1946, this very school denied admission to Heman Marion Sweatt because he was black, prompting him to sue the University. Sweatt's real difficulties began fifty years before when the United States Supreme Court scripted one of this nation's most evil conceits in *Plessy v. Ferguson*, 163 U.S. 537 (1896), declaring "separate but equal" treatment of black Americans constitutional. *Plessy* was no more than a license for continued racial discrimination. However, in 1950 the Supreme Court held that excluding Sweatt on account of his race violated the Equal Protection Clause of the Fourteenth Amendment. *Sweatt v. Painter*, 339 U.S. 629 (1950).[1]

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[1]When a court ordered the State to provide a law school for blacks, Texas created a "makeshift law school that had no permanent staff, no library staff, no facilities, and was not accredited." *Hopwood v. State of Texas*, 861 F. Supp. 551, 555

History, in its characteristic irony, takes this court to that hallowed ground of civil rights jurisprudence to assess the University's effort to encourage minority enrollment and counter its legacy of segregation. It is an unfortunate, further irony that the panel majority opinion should so overreach in its decision. In Sweatt's case, the Supreme Court explicitly adhered to the "principle of deciding constitutional questions only in the context of the particular case before the Court," drawing its decision "as narrowly as possible." *Id.* at 631 (citing *Rescue Army v. Municipal Court*, 1947, 331 U.S. 549 (1947)). If there were ever a time to end legalized segregation, that was the time. The Court was in a position to paint with a broad brush and eliminate the very regime which denied civil rights to Sweatt and other blacks. Chief Justice Vinson's opinion for the Court, however, resisted calls to wax on "[b]roader issues . . . urged for our consideration." *Id.*

The panel majority in our case displayed no such discipline, instead taking the unauthorized liberty of deciding the appropriateness of diversity as an admissions criterion, not just the merits of the instant admissions policy. Constitutional interpretation is a sensitive project. Limiting ourselves to the facts before the court keeps the process measured--it is a traditional check which respects the need to calibrate rights and interests carefully. Given the sensitivity of constitutional interpretation, the panel majority's decision disrespects the importance of the facts. Refusing to correct this travesty en banc is a grave error.

(1994). This "law school" consisted of 3 rooms in a basement and had two professors. Paul Butler, *Affirmative Action Admissions*, Dallas Morning News, April 7, 1996, at 1J.

As to the request to intervene, what class of persons is more qualified to adduce the evidence of the present effects of past discrimination than current and prospective black law students? Reading *Sweatt* as a benchmark decision marking the end of *de jure* segregation is akin to shelving Trotsky's The History of the Russian Revolution upon reading only the preface. Just as those initial pages fail to give a true rendition of the entire work, so too does *Sweatt* give only a superficial understanding of the racism it hardly addressed. A year after the Supreme Court ordered that Sweatt be admitted, he left the law school "without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings." *Hopwood v. State of Texas*, 861 F. Supp. 551, 555 (1994). Furthermore, "the record reflects that during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students." *Id.* It was not until 1983 that Texas even agreed, after years of threats of federal action, to an acceptable plan to desegregate its higher education system. In 1987 and again in 1994, the Department of Education instructed Texas to maintain its plan. To this day, Texas's higher education system still has not been declared in compliance with Title VI and the Fourteenth Amendment. *Id.* at 556-57.

"The life of the law," Justice Oliver Wendell Holmes observed, "is not logic, but experience." To divorce the time in which it was legally possible for Sweatt to attend the Law School from the reality he experienced there is to ignore the very insidiousness of racial discrimination. It was the vestiges of that discrimination which, far from being destroyed, thrived and drove Sweatt out of the Law School. We act no less callously now in

pretermitting the consideration of that legacy by denying rehearing.

For all these reasons and those expressed in the collective dissent, I vehemently disagree with our court's decision not to rehear this case en banc.

Supreme Court, U.S.
F I L E D
JUN 14 1996
CLERK

No. 95-1845

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THURGOOD MARSHALL LEGAL SOCIETY AND
BLACK PRE-LAW ASSOCIATION,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the petition for certiorari, filed on May 13, 1996, give this Court jurisdiction over the judgment of the Fifth Circuit dated May 11, 1994 affirming the final judgment of the District Court dated January 24, 1994?

2. Did the Fifth Circuit correctly apply the "law of the case" doctrine in its judgment dated March 18, 1996?

3. Did the courts below correctly decide that petitioners did not show that their interests were "inadequately represented" (one of the four required elements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure) or can a finding of "inadequate representation" be predicated solely upon the fact that a party has not used every argument and every piece of evidence that a would-be intervenor believes could be used?

4. Could the courts below have reached the same result, denying petitioners intervention, by relying upon any of the other three required elements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure?

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No. 95-1845

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1995

THURGOOD MARSHALL LEGAL SOCIETY AND
BLACK PRE-LAW ASSOCIATION,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

Respondents Cheryl J. Hopwood and Douglas W. Carvell (hereinafter "plaintiffs") respectfully submit this brief in opposition to the petition for a writ of certiorari by the Thurgood Marshall Legal Society ("TMLS") and the Black Pre-Law Association ("BPLA"). (The petition lists the other respondents. Pet. iii.)

INTRODUCTION

Petitioners are would-be intervenors, whose belated and flawed efforts to intervene were repeatedly rejected by the courts below. The petition presents a question of federal civil procedure: whether petitioners properly could intervene pursuant to Rule 24(a), Fed. R. Civ. P., in a pending lawsuit. A vast array of judges repeatedly and consistently have decided that question against petitioners in the courts below. Not easily discouraged, petitioners now ask this Court to grant certiorari in order to review the lower courts' initial application of Rule 24(a) and the subsequent application of the "law of the case" doctrine. They apparently seek a judgment from this Court reversing the unanimous decisions of the lower courts denying intervention, and ordering such intervention as well as discovery and a new trial of the underlying lawsuit.[1]

This Court should not exercise its discretionary certiorari jurisdiction to review such limited and fact-bound issues. In any event, the courts below correctly addressed these questions.

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[1] Even this is not altogether clear. Petitioners assert that this Court "should grant certiorari on both the merits petition and this petition to assure that in reaching *its* decisions . . ., *the Court* has the benefit of the full presentation of relevant evidence . . . " (Pet. 24-25, emphasis added). *See also* Pet. 9-10 n.4 (merits appeal should include petitioners). They apparently want either to intervene for the first time *at the Supreme Court level* and/or to present their evidence concerning the Texas Index, rejected in the lower courts and never subjected to discovery or cross-examination, to this Court. This would be, to say the least, unusual.

STATEMENT OF THE CASE

Petitioners' description of the proceedings in the courts below omits crucial facts, and misrepresents others.

A. Pre-Trial Proceedings

The underlying lawsuit in which petitioners sought intervention began in September 1992 with the filing of a complaint by plaintiff Hopwood and another individual who subsequently voluntarily dismissed her claim. In April 1993, another group of plaintiffs, including plaintiff Carvell, filed a second complaint. (Several of the plaintiffs named in this second complaint also voluntarily dismissed their lawsuit.) In both complaints, the named defendants were the State of Texas and the Regents of the University of Texas System. The complaints alleged that the defendants administered a racially discriminatory admissions program at the University of Texas Law School ("UT Law School") in violation of plaintiffs' rights under the Fourteenth Amendment to the United States Constitution and various statutes.

In November 1992, the district court initially set a scheduling order fixing a March 16, 1993 discovery deadline for Hopwood's action. R. 27-29. The court subsequently extended that deadline. Contrary to the impression left by petitioners (Pet. 3), there was no distinct "bifurcation" of discovery on issues like standing and ripeness, and discovery on the "merits." Indeed, as the district court's October 1993 order denying defendants' summary judgment motion on these issues (R. 588-605) demonstrates, the standing and ripeness issues directly involved the details of UT Law School's admissions procedures. Indeed, the district court's decision in

October 1993 reflects the extensive discovery that had been taken with respect to those procedures.

The district court denied all of defendants' summary judgment motions in its October 1993 order, and discovery continued. Contrary to petitioners' representations to this Court (Pet. 3), the district court did not first "authorize[] the beginning of merits discovery" on November 17, 1993. Rather, in that order, it set various deadlines and scheduled a pre-trial conference for March 4, 1994. "Merits" discovery already had begun, and was ongoing.[2]

In February 1994, subsequent to petitioners' first motion for intervention, plaintiffs filed a consolidated, amended complaint. In that complaint, plaintiffs named the University of Texas, UT Law School, and various officials of each as additional defendants.

B. Petitioners' First Motion To Intervene And First Appeal

Petitioners first moved to intervene, pursuant to both Rule 24(a) and Rule 24(b), Fed. R. Civ. P., on January 5, 1994, more than 15 months after the commencement of the action, some 10 weeks after the district court's denial of defendants' summary judgment motions, and only about 12 weeks before the scheduled

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[2] The district court also decided various outstanding discovery motions in its November 17 order, including a motion filed *before* the district court's October 1993 order, seeking answers to interrogatories concerning recruitment efforts and scholarship programs for minorities by UT Law School. Thus, the November 17 order further evinces the ongoing process of "substantive" discovery.

end of discovery. Petitioners argued, *inter alia*, that the State of Texas had not protected the rights of African-Americans in the past. (For its part, the State denied that it had anything to do with the admissions program at UT Law School.)[3] On the first motion to intervene "[p]etitioners also made clear their intention to raise questions about the discriminatory effect of the use of the Texas Index as an admissions sorting device" (Pet. 26). (The Texas Index ("TI") is a composite blend of undergraduate GPA and LSAT scores used by UT Law School in the admissions process. App. 3a-4a & n.1.)

In a decision and order dated January 19, 1994 (App. 190a-195a), the district court denied petitioners' motion to intervene. The district court first noted the belatedness of the motion. App. 191a ("Now, with only a little over two months to go before the completion of discovery, which has already been a contentious process and evidently involves a multitude of documents, two new entities wish to become parties to the litigation"). Then, considering first the motion to intervene as of right, the district court identified the four requirements of Rule

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[3] One of the issues raised by defendants in their motion for summary judgment filed in August 1993 was that plaintiffs had named the wrong defendants. More specifically, the named defendants, the State of Texas and the Board of Regents, argued that they "ha[d] no operational or policy control over the admission practices of the School of Law." D-447, Dfs. Memo. In Support of SJ Mot., p. 33. *See also* D-337 (declaration of dean of UT Law School stating under oath that "[t]he actual mechanics of our admissions policies, including its goals of minority recruitment and diversity in the incoming class, are the province of the admissions committee and myself exclusively. There are no directives, instructions, orders or any other form of commands from the State, the Board of Regents, or the University as a whole that govern the admissions process").

24(a): (1) a timely motion, (2) by a movant with an interest in the underlying lawsuit, (3) that might be impaired by the disposition of the lawsuit, and (4) an inadequate representation of that interest by the existing parties to the litigation. App. 192a.

Although movants have the burden of showing that they can meet all four requirements,[4] the district court found that it needed to consider only one, "inadequate representation." The Court noted that "as a practical matter, [petitioners] and the Defendants have the same ultimate objective in this lawsuit -- the preservation of the [current] admissions policy" (App. 192a). While recognizing that the presumption of adequate representation can be rebutted "on a relatively minimal showing" (App. 193a), the district court held that petitioners had not met even this slight burden because they had provided nothing more than mere allegations that the State defendants would not adequately represent their interests. In holding that such allegations were insufficient, the Court also expressed concern for the "obstruction and delay that may be caused by allowing intervention" in the case (App. 193a).

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[4] *E.g.*, *Doe v. Duncanville Independent School Dist.*, 994 F.2d 160, 168 (5th Cir. 1993) ("all four . . . factors [must] be present before a party may be entitled to intervention as of right"); *Conservation Law Foundation v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992) ("An 'applicant who fails to meet any one of these requirements cannot intervene'"); *New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992) (same); *United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 414 (5th Cir. 1991) (burden of proof on movant). *See generally* 7C Wright, Miller & Kane, *Federal Practice And Procedure*, § 1908 at 262 (1986) (requirements are a timely application, an interest in the subject matter, a potential for impairment of that interest, and inadequate representation).

The district court also rejected the petitioners' application pursuant to Rule 24(b), finding that "adding the prospective intervenors as defendants at this juncture would needlessly increase cost and delay disposition of the litigation" (App. 194a).[5]

Since the district court's order was a final judgment for petitioners, they were able to (and did) immediately appeal. The Court of Appeals accommodated petitioners' request that their appeal be heard quickly, and granted their motion to expedite the appeal.

While the appeal was pending, the parties' discovery continued, and was completed, in the district court. Pursuant to the district court's scheduling order, the parties exchanged their final expert lists, identifying each of their experts and their proposed testimony, in mid-April. R. 1022, 1024-28. Although neither petitioners' proposed expert nor any other expert who would challenge the validity of the Texas Index appeared on defendants' expert list, petitioners did not ask the district court to reconsider their application to intervene and did not seek to supplement the record in the Court of Appeals.[6] Petitioners' suggestion that they moved to present their evidence "*[a]s soon* as it became clear" that the defendants

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[5] Although "undue delay" and "prejudice to the parties" are additional considerations identified in the last sentence of Rule 24(b), they are also factors in a "timeliness" analysis -- indeed, "prejudice to the parties" is the most important factor. *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir. 1970).

[6] The Fifth Circuit maintains a procedure for moving to amend a final judgment pursuant to Rule 60(b) while an appeal is pending from that judgment. *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 (5th Cir. 1976).

would not do so (Pet. 22 (emphasis added); *see also* Pet. 7) is just wrong.

The Court of Appeals affirmed the district court's judgment denying intervention in an opinion and judgment dated May 11, 1994. App. 98a. With respect to petitioners' motion to intervene "as of right" under Rule 24(a), the Court of Appeals held that where the party whose representation is said to be inadequate is a governmental entity, a movant seeking intervention had to make "a much stronger showing of inadequacy" (App. 97a (citing Wright & Miller, *Federal Practice and Procedure*, § 1909 (1986)). The Court held that, under such circumstances, a proposed intervenor had to "demonstrate that its interest is in fact different from that of the state" (App. 98a). While explicitly recognizing petitioners' argument that the State was "not in as good a position to bring in evidence of . . . *current* discrimination" (App. 98a (emphasis added)), the Court of Appeals held that petitioners had not "met their burden of demonstrating that they have a separate *interest* that the State will not adequately represent" (App. 98a-99a (emphasis added)). The Court also held that the district court's finding that intervention would needlessly increase costs and delay disposition of the lawsuit was not an abuse of discretion, and, accordingly, affirmed the denial of petitioners' motion for permissive intervention.

Petitioners did not seek rehearing or rehearing en banc, and did not file a petition for certiorari with this Court within the time prescribed by 28 U.S.C. § 2101(c).

C. Trial And Post-Trial

A bench trial was held before the district court on

May 16-20, 1994 and May 23-25, 1994. Again, although the lists of witnesses from both sides were available long before trial, and petitioners thus knew who would be called, and what they would testify to, they never moved before or during trial for reconsideration of the denial of their motion to intervene on the ground that defendants were not presenting evidence attacking the validity of the Texas Index.

Contrary to petitioners' concerns, defendants vigorously defended their 1992 admissions system by, *inter alia*, arguing that it was a narrowly-tailored means of remedying the present effects of past discrimination against African Americans and Mexican Americans by UT Law School, the system of higher education as a whole, and local school districts in the State of Texas. (Indeed, petitioners' "Statement Of Facts" relies heavily on those parts of defendants' evidence cited in the district court's opinion. Pet. 9-15.)

Defendants' expert witnesses went to great lengths to detail the history of discrimination in Texas. Thus, for example, one of defendants' experts gave a long history of slavery in Texas, racial violence in Texas from the Civil War to the early 20th century, black education in roughly the same time period, Heman Sweatt's efforts to enter UT Law School in the late 1940's and early 1950's, and miscellaneous discriminatory incidents in Texas in the 1950's and 1960's (Trial Tr. Vol. 19, pp. 9-30; Trial Exs. D-476 to D-480). The defendants also called a number of student witnesses, including a member of petitioner TMLS (Trial Tr. Vol. 14, p. 31), who described their view of the reputation of UT Law School and what they believed were acts which led to an uncomfortable or hostile "racial atmosphere" on campus.

Post-trial briefs were due on June 13, 1994. Petitioners, who had been granted amici status by the district court (Pet. 5), were permitted to submit a brief. In flagrant violation of Rule 43(a), Fed. R. Civ. P., which mandates that "testimony of witnesses shall be taken orally in open court," petitioners took this opportunity to submit, in addition to a brief, the declaration of their expert. Pet. 6. Their brief conceded that the "psychometric analysis" performed by their expert is "a complex and technical area" (R. 1255 n.6), and indicated that their expert was "readily available to the Court and to the parties should the Court desire further elaboration of his declaration testimony" (*id.*). They explained that they had offered their expert to the defendants as a witness, but that the defendants had "declined the offer" (*id.*). Pet. 5-6.

Plaintiffs immediately moved to strike the declaration of petitioners' expert (and other non-record exhibits that had been submitted by petitioners). The district court denied that motion in an order dated June 22, 1994 but held that "to the extent amici has [sic] presented new issues and evidence not presented at trial in its brief and exhibits, the Court will not consider such evidence, which is outside the record for any purpose." R. 1450.

In August 1994, the district court issued a decision (App. 101a-186a) declaring the admissions system used by UT Law School in 1992 unconstitutional, but refusing to award any significant relief to plaintiffs. Plaintiffs appealed the subsequent final judgment (186a-87a) to the Court of Appeals.

D. Petitioners' Second Motion And Second Appeal

On July 12, 1994, six weeks after the trial, the petitioners renewed their prior motion to intervene. In this motion, the petitioners sought intervention "for the limited purpose of introducing [their expert's psychometric] evidence and allowing plaintiffs to cross-examine their expert and offer any independent evidence of their own on the issue of the validity of the Texas Index" (R. 1454-55). The petitioners also sought a "limited opportunity for discovery" to obtain certain data (R. 1455 n.5). Only a few days after petitioners made their motion to renew, the district court summarily denied the motion. App. 188a-89a.

Petitioners appealed this second denial to the Court of Appeals. Shortly thereafter, they separately moved to intervene in the Court of Appeals in plaintiffs' appeal of the district court's final judgment on the merits. In an order entered on November 14, 1994, the Court of Appeals denied that motion.

Petitioners' second appeal was eventually consolidated with plaintiffs' appeal of the final judgment on the merits. On March 18, 1996, the Court of Appeals issued an opinion deciding both appeals. On the merits appeal, the Court held, *inter alia*, that the district court had understated the scope of the constitutional violation and improperly had imposed certain burdens on the plaintiffs in assessing damages. (The defendants in the underlying action have filed a separate petition for writ of certiorari seeking review of that part of the judgment. Sup. Ct. No. 95-1773.)

On petitioners' second appeal, the Court of Appeals unanimously dismissed for want of jurisdiction. App. 69a-76a; 89a n.25. The Court of Appeals repeatedly noted that the petitioners had presented in their previous appeal the argument that the State defendants would not present a "test invalidity" defense, and that the prior panel had rejected that argument. App. 70a ("The [prior] panel implicitly considered and rejected . . . a defense based upon the use of TI scores under title VI, as the [petitioners] argued that possibility as one basis for intervention"); App. 73a-74a ("There is no question that the *Hopwood I* panel addressed the intervention as a matter of right *de novo*, on the merits, including the potential that the law school would not raise every defense proposed by the [petitioners]"); App. 76a ("Here, the record shows that the [petitioners] raised this same title VI argument before the *Hopwood I* panel in both their brief and at oral argument").[7] The Court rejected petitioners' contention that the failure of the defendants at trial to present the test-invalidity "defense" constituted any sort of changed circumstance that could justify reconsideration of the prior panel's decision. App. 73a n.59. The Court also noted that the Title VI issue had not been litigated in the underlying lawsuit, and that nothing in its decision, or in the underlying lawsuit as a whole, would preclude petitioners from commencing an action based upon the alleged invalidity of UT Law School's admissions criterion. App. 76a n.62.

On or around March 29, 1996, petitioners sought rehearing from the Court of Appeals. That petition was denied. App. 198a. Of the sixteen active judges on the

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[7] Under the Fifth Circuit's Local Rule 34.7, "[o]ral arguments in all cases are tape recorded for the exclusive use of the Court."

Fifth Circuit that considered that petition, only one objected to the ruling denying intervention -- and that one judge's single, plaintive question (Pet. 9) hardly addressed any of the merits of either panel's opinion.

RELEVANT FACTS

Rather than focus on the facts relevant to their petition, petitioners try to deflect attention by presenting a long discussion of the facts relating to the merits of the *underlying* lawsuit. *See, e.g.*, Pet. 9-10. (They also criticize the decision of the Court of Appeals on the merits at great length, although that obviously has no bearing on their petition either. *E.g.*, Pet. 9-10 n.4; 19-20.) Suffice it to note that the history of admissions at UT Law School, and the admissions system applicable in 1992, are set forth in the opinion of the Court of Appeals (App. 3a-11a).

REASONS FOR DENYING THE WRIT

This Court requires "compelling reasons" and circuit splits on "important questions" before invoking its certiorari jurisdiction. The questions about Rule 24(a), Fed. R. Civ. P., and the "law of the case" doctrine that petitioners raise fail to meet these requirements. Moreover, (1) granting the petition would raise complex threshold questions involving this Court's jurisdiction and (2) this Court cannot resolve the ultimate question of whether petitioners should have been allowed to intervene without answering a host of other fact-bound questions that the courts below had no need to address. For all of these reasons, the petition should be denied.

A. This Court Lacks Jurisdiction Over The 1994 Judgment

A petition for a writ of certiorari in a civil action seeking review of a judgment must be filed within ninety days after the entry of that judgment. 28 U.S.C. § 2101(c); Sup. Ct. Rule 13.1. This time limit is jurisdictional and must be adhered to strictly. *Stone v. I.N.S.*, 115 S. Ct. 1537, 1549 (1995); *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

Although this Court can reach back and consider "interlocutory" decisions of the lower courts in the same case upon appeal from a later judgment, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916), it will not consider previous decisions that are "final" decisions in a litigation. *E.g.*, *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923) (first denial of certiorari was from a "final decree, and we are expressly denied power to review it after three months"). Accordingly, this Court has jurisdiction to consider that May 1994 judgment only if it was an "interlocutory" decree subject to the Court's power to review such decrees, and not a "final" decree.

This Court has never definitively stated whether an order denying a motion to intervene pursuant to Rule 24(a), Fed. R. Civ. P., is "interlocutory" for purposes of its ability to reach back and consider such orders. However, several Courts of Appeals have considered that question for purposes of *their* jurisdiction; and each of those courts has concluded that (1) such orders are "final" judgments and *must* be immediately appealed, and (2) they cannot review such orders upon appeal from a later order denying intervention or from the final judgment in the

lawsuit. *United States v. City of Oakland*, 958 F.2d 300, 302 (9th Cir. 1992) (although United States conceded that intervention as of right was warranted, court had no jurisdiction over order denying intervention where appeal was not taken until after final judgment on the merits); *United States Environmental Protection Agency v. City of Green Forest*, 921 F.2d 1394, 1401 (8th Cir. 1990) (where first intervention motion was denied on December 3, 1987, second intervention motion was denied on March 24, 1989, and notice of appeal was filed on April 20, 1989, court ruled that "we lack jurisdiction over the December 3, 1987 order denying intervention"); *United States v. Dallas County Commission, Dallas County, Alabama*, 850 F.2d 1433, 1442-43 (11th Cir. 1988) (Court had no jurisdiction over appeal of denial of motion to intervene under Rule 24(a) filed twenty months after denial of the motion by the district court).[8]

These courts unanimously have reached that conclusion despite the fact that the jurisdiction of the Courts of Appeals under 28 U.S.C. § 1291 permits them to "reach back" and consider interlocutory orders (which are "merged" into the final judgment), just as this Court's jurisdiction permits it to do. 11A Wright, Miller & Kane, *Federal Practice And Procedure*, § 2962 at 433 (1995) ("Upon an appeal from the final decree every interlocutory order affecting the rights of the parties is subject to review in the appellate court").

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[8] In a departure from the other Courts of Appeals, the Eleventh Circuit in *Dallas County* did state that it had jurisdiction over the denial of the intervention motion to the extent it was based upon Rule 24(b), Fed. R. Civ. P. The distinction is unimportant here because petitioners only seek review of the denial of their application under Rule 24(a). *See* Pet. i. App. 71a.

Both common sense and considerations of orderly judicial procedure suggest that this Court should follow a similar rule. A rule requiring this Court to consider earlier denials of motions to intervene would permit unsuccessful intervenors to circumvent the jurisdictional time periods set forth in 28 U.S.C. § 2101 by simply filing yet another motion in the district court (as petitioners did here), appealing the denial (as petitioners did here), losing in the Court of Appeals on the ground that nothing had changed since the previous motion to intervene and the previous unsuccessful appeal (as petitioners did here), and then seeking review in this Court two years after the initial Court of Appeals decision (as petitioners do now).

B. The Decision Of The Court Of Appeals On The "Law Of The Case" Doctrine Is Not Worthy Of Review

Because this Court has no jurisdiction over the May 1994 judgment of the Court of Appeals, the *only* question properly before this Court is whether the Court of Appeals, in March 1996, properly applied the "law of the case" doctrine to petitioners' second appeal. Although petitioners identify the proper application of this doctrine as their fourth "question presented," they do not mention this doctrine at all in the "Reasons For Granting The Writ" segment of their petition. Moreover, they attempt to "refute" the factual predicate of the Court's decision (that the earlier panel had already passed on petitioners' arguments) only in an *ipse dixit* footnote asserting that the Court was "patently wrong." Pet. 28 n.6. *See also* Pet i (arguments "patently were not decided").

Of course, even if petitioners were correct that the

Court of Appeals *had* misapplied the "law of the case" doctrine, that would hardly warrant this Court's attention. Petitioners point to no conflict among the circuits or other compelling reason to review this well-established doctrine.

In any event, the Court of Appeals applied the doctrine correctly. As petitioners themselves concede in describing their *first* application to intervene, at that time they "made clear their intention to raise questions about the discriminatory effect of the use of the Texas Index as an admissions sorting device" (Pet. 26). How they arrive at their conclusion that the Court of Appeals did not even *implicitly* pass upon that possible "separate defense" in the May 1994 judgment is less than clear. Conspicuously, Judge Wiener served on both panels, App. 2a, 94a, and fully endorsed the conclusion that the first panel had considered and rejected petitioners' "test invalidity" defense. App. 89a, n.25.

C. The "Standard" Under Which The Courts Below Evaluated "Inadequate Representation" Is Of No Consequence Because Petitioners Fail To Meet Their Burden Under Any Relevant Test

Assuming *arguendo* that this Court has jurisdiction to review the May 1994 judgment, the Rule 24(a) issues petitioners raise are unworthy of review by this Court.

Petitioners assert that there is a "circuit split" concerning the appropriate standard under which to judge whether a proposed intervenor's interests are "adequately represented" (one of the four elements under Rule 24(a)), and that this Court should grant certiorari to resolve that split. Pet. 17-19. In the first place, petitioners' "circuit

split" is contrived.[9] Even if it were not, petitioners ignore the fact that the district court *applied* the "minimal standard" that they now presumably ask this Court to adopt (App. 193a ("the presumption of adequate representation may be rebutted on a relatively minimal showing")) -- and they still lost. Petitioners assert that the district court "employed a standard more stringent than that articulated by this Court in *Trbovich*" (Pet. 26). Plainly, it did not. Petitioners simply do not like the outcome the district court reached by applying that standard.

Both courts below were correct, both times, under any standard. Petitioners could not (and cannot) meet any standard to show that the representation of the defendants was (and is) inadequate. At the end of the day, all petitioners ever demonstrated was that they had an unpersuasive argument that defendants would not use (first

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[9] Petitioners concede that the D.C. and Eighth Circuits follow the *parens patriae* rule; assuming for the sake of argument that those courts occasionally interpreted it "liberally" in one case or another, it hardly creates a circuit split on a question of law. Contrary to petitioners' claim, the Ninth Circuit also follows the *parens patriae* rule, *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1498-99 (9th Cir. 1995). The Tenth and Eleventh Circuit cases that petitioners cite did not squarely address the *parens patriae* issue, and petitioners feel obliged to cite non-existent footnotes to demonstrate their point in the Eleventh Circuit. Perhaps most disingenuously, they cite a First Circuit case discussing *another issue altogether* -- the standard determining whether a "significantly protectable" interest exists, a distinct requirement under Rule 24(a) -- to further bolster their so-called "circuit split."

motion) and did not use (second motion).[10] Rule 24(a) does not permit intervention simply because a party chooses not to adopt every argument a proposed intervenor wishes to raise. *E.g.*, *United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986) (gay and lesbian group did not show inadequate representation by local human rights commission where the commission "imprudently stipulated to facts that it should not have and . . . did not sufficiently challenge certain evidence proffered by the [federal] government"); *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) ("representation is not inadequate simply because the applicant and the representative disagree regarding the facts or law of the case" citing *United States v. Board of School Commissioners*, 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973)). *Cf. Sam Fox Publishing Co. v. United States*, 366 U.S. 683,

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[10] Petitioners assert that "[o]ne need not presume animus" (Pet. 5 n.2) for defendants' failure to submit "test invalidity" evidence, and this is true. In general, LSAT/GPA indices are widely used (App. 130a) precisely because they are valid. In any event, the circuit courts repeatedly have held that the use of an invalid test *does not* justify subsequent race-conscious decision-making to "remedy" the use of the invalid test. *See Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (en banc) ("the city cannot get points for first using a presumptively biased eligibility list to make a string of white promotions and then turning around and trying to do some rough racial justice by promoting two blacks from the bottom of the list") quoting *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 290 (1993)); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1572 (11th Cir. 1994) ("Use of racial hiring quotas to mask the effects of discriminatory selection procedures places grievous burdens on blacks as well as whites"). Surely, given this uniform case law under the Fourteenth Amendment, it was hardly *irrational* for defendants to decline to adopt petitioners' quixotic argument.

689 (1961) (in denying application to intervene, court notes that "sound policy would strongly lead us to decline [proposed intervenors'] invitation to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting"). Defendants' decision not to use petitioners' "psychometric evidence" is insufficient.

D. Determining That Petitioners Should Be Allowed To Intervene Would Require This Court To Resolve Numerous Fact-Specific Questions Not Passed Upon By The Lower Courts

Finally, this Court should deny certiorari because the courts below could have relied upon any of the other elements required under Rule 24(a) to deny petitioners' repeated motions to intervene. They did not base their rulings on those other grounds for the simple reason that, having determined that petitioners' interests (assuming they had any) were adequately represented by the defendants, there was no need to reach the other requirements of Rule 24(a).[11]

In general, the lower courts repeatedly have emphasized that the four-part standard under Rule 24(a)(2) is a flexible, practical standard that should attempt to meet the exigencies and specific facts of individual cases. *E.g.*, *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202 (5th Cir. 1992) ("the inquiry under [Rule 24](a)(2) is a flexible one,

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[11] Petitioners assert that "[o]n no occasion" (Pet. 25) has a court held in this case that petitioners cannot meet the other three requirements for intervention. While technically true, this statement is somewhat misleading for the reason stated in the text.

which focuses on the particular facts and circumstances surrounding each application . . . [I]ntervention of right must be measured by a practical rather than technical yardstick" (internal quotation marks omitted)). As a consequence, many circuit courts review orders granting or denying intervention under an abuse of discretion standard. *E.g.*, *Building And Const. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) ("We review the district court's decision to deny intervention under an abuse of discretion standard"); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994) ("Because of the variety of factual circumstances that face a district court [deciding a motion to intervene], and the close proximity of that court to the case's nuances, it has the advantage of having a better 'sense' of the case than we do on appeal. For that reason intervention decisions are reviewed under an abuse of discretion standard"); *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir.), *cert. denied*, 484 U.S. 947 (1987) ("[I]ntervention controversies arise in many different contexts, and require the court to consider the pragmatic consequences of a decision to permit or deny intervention . . . . This same reasoning supports an abuse of discretion standard of review, which we now adopt."); *Caterino v. Barry*, 922 F.2d 37, 40 (1st Cir. 1990); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

To hold that petitioners should be allowed to intervene, this Court would have to decide issues related to the three requirements other than "inadequate representation," and without the benefit of any fact-finding or analysis from either lower court. (On the other hand, if this Court grants the petition solely to review whether petitioners proved "inadequate representation," it will not resolve the underlying issue of whether petitioners should

be allowed to intervene.) There were numerous fact-sensitive issues raised by petitioners' motions to intervene, and which would now have to be reviewed by this Court, among them:

1. Was petitioners' motion to intervene untimely given their decision to wait fifteen months after this case began -- and even ten weeks after the summary judgment issues were resolved -- before making a motion to intervene?

2. Is the district court's finding on the first motion that intervention would "increase cost" and "delay disposition" of the litigation relevant to any consideration of timeliness? *See* n.5, *supra*.

3. Is petitioners' failure to ask the district court to reconsider the initial denial of their motion in April 1994 fatal to their second attempt to intervene because the parties were obligated to submit final expert witness lists at that time and petitioners thus knew that defendants would not call petitioners' expert or any other expert who would testify concerning the validity of the Texas Index?

4. Is the fact that petitioners first tried to submit a "declaration of an expert witness" (Pet. 6) as *amici* before moving to intervene relevant to the timeliness of their second motion?

5. Do students applying to UT Law School have a "significantly protectable interest" in some particular admissions process? *See Donaldson v. United States*, 400 U.S. 517, 531 (1971) (holding that interest under Rule 24(a) had to be a "significantly protectable" interest, and ruling that taxpayer lacked such interest in an

action by the government seeking to enforce subpoenas served as part of an investigation of the taxpayer).

6. Since the Court of Appeals specifically noted that its decision could not be used to preclude an independent Title VI challenge to UT Law School's use of the Texas Index, are petitioners' interests (or those of its past, present, or future members) "impaired" by the judgment of the Court of Appeals?

7. Do petitioners *qua* groups have their own legal interests? Is it sufficient that they are simply "interested" in the outcome of the decision? *But cf. Sierra Club v. Morton*, 405 U.S. 727 (1972).

8. Assuming that petitioners can represent their members' interests, is it of consequence that there is nothing in the record to demonstrate that any identifiable member of petitioner BPLA had (much less still has) a specific interest in applying to and attending UT Law School? *See Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 203 (5th Cir. 1984), *aff'd in part, vacated in part, on other grounds*, 473 U.S. 432 (1985) (holding that the failure to identify an affected member defeats standing). *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (for standing purposes, possibility of injury cannot be remote).

None of these issues (and a number of related issues) were addressed, much less decided, below.

Although space considerations preclude complete answers to each of these complex questions, the issues of petitioners' "significantly protectable interests," and their ability to protect them, deserve some additional

elaboration. Plainly, UT Law School is not *obligated* to engage in any particular form of affirmative action under *United States v. Fordice*, 505 U.S. 717 (1992) both because (1) there is no relevant policy traceable to the *de jure* era before *Sweatt v. Painter*, 339 U.S. 629 (1950) (App. 58a & n.48, 112a-13a & n.8) and (2) *Fordice* would only obligate UT Law School to eliminate such policies. Thus, petitioners have no *legal* interest in the now-defunct system used in 1992. (If they did, some member presumably would have sued when it was abandoned.)

Moreover, even if (contrary to law) an "interest" could be demonstrated simply by showing that an applicant's *odds of being admitted* would be affected, petitioners' claim would still fall short.[12] Petitioners cannot say precisely how UT Law School will adjust its admissions procedure to the holding of the Court of Appeals that it cannot use race in its admissions process. Texas educators have, to date, demonstrated a remarkable

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[12] If that were the only criterion, of course, presumably the Jewish Pre-Law Students and the Chinese Pre-Law Students -- indeed, *any* individual undergraduate who might have expressed an intent to apply to UT Law School -- could have intervened on one side or the other. If individuals from one group's chances of being admitted are affected, so are individuals from all others. *Compare Cohn v. E.E.O.C.*, 569 F.2d 909, 911 (5th Cir. 1978) (in ruling that two employees whose promotions were vacated by the district court could intervene pursuant to Rule 24(a), the court stated that "[h]ad the applicants sought to intervene in [plaintiff's] original suit [prior to their promotions], the possible detriment to their likelihood of promotion that might have been wrought by the award to [plaintiff] of constructive service would not have constituted a sufficiently protectable interest to warrant intervention of right").

resilience in their efforts to assist minority students.[13] Law School may, for example, reduce its reliance on the Texas Index (App. 3a-4a) and consider other factors (*e.g.*, an applicant having worked his or her way through college) far more heavily. It may change the index to weigh GPA more heavily. The record does not state how this might affect minority admissions in general, much less any specific applicant who happened to be a member of BPLA.

One of petitioners' own cases, *Ass'n Against Discrimination In Employment v. Bridgeport*, 594 F.2d 306 (2d Cir. 1979) (Pet. 24) perhaps best illustrates this point. Petitioners cite it for the proposition that a state employer can engage in race-conscious hiring to "remedy" an invalid test, but the case has no such holding. Rather, the Court remanded to determine whether a lower cut-off score on the test would eliminate any disparate impact. *Id.* at 313 & n.19. (The absence of a disparate impact, of course, eliminates any claim under Title VI or Title VII, regardless of the underlying validity of the criteria.) So, too, UT Law School here may arrive at a similar system, which relies less on the Texas Index, and which eliminates

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[13] Prior to the Court of Appeals granting defendants a stay of mandate, defendants redesigned their race-based scholarships (which they deemed affected by the decision on the merits) to focus on the "educationally disadvantaged." *See, e.g.*, Carlos Sanchez, *College Aid Plan Revived By Board*, Fort Worth Star Telegram, April 19, 1996, at 19, 22 (Higher Education Commissioner Kenneth Ashworth states that "educationally disadvantaged" will "cover many of the students who currently qualify for minority scholarships"; "'Sometimes there is more than one way to reach an objective,' said board member Juan Hinojosa").

any disparate impact.[14] If it chooses "strict use of the Texas Index" (Pet. 26), then petitioners (or, more accurately, those actually seeking to apply to UT Law School) can attack the validity of that criterion in a separate lawsuit.[15]

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[14] In fact, UT Law School could have eliminated any disparate impact by using the Texas Index as a cut-off point instead of a decisive factor. For example, the evidence at trial demonstrates that, among 1992 resident Texan applicants with TI scores above 180 (the low end of the "discretionary" scale for African-Americans and Mexican-Americans (App. 8a)), approximately 20% were minorities. Resident minority applicants constituted approximately 21% of those offered admission under UT Law School's racially-discriminatory system. Trial Ex. P-139. Consequently, using the TI as a cut-off, UT Law School could have admitted roughly the same percentage of minorities among its resident applicants -- *without* discriminating.

Of course, the very existence of race-neutral alternatives to defendants' race-conscious system demonstrates that it was not narrowly-tailored -- regardless of what one considers a "compelling interest." *Cf. Ass'n Against Discrimination v. Bridgeport*, 594 F.2d at 313 (possibility of eliminating disparate impact by lowering score "affects not only the remedy ordered by the [district court] judge, but also the basic finding of liability").

[15] Petitioners' "Gordian knot" footnote -- suggesting the dreary possibility of an endless cycle of lawsuits with "no reasonable end in sight" (Pet. 29 n.7) -- again misses the point. While there may be retrospective or remedial orders of various kinds in the unlikely event that petitioners could demonstrate the invalidity of a LSAT/GPA index, the only prospective remedy would be elimination of the invalid criterion. If it is replaced with a valid criterion, it is unclear who could complain.

CONCLUSION

The petition should be denied.

June 14, 1996

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No. 95-1845

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THURGOOD MARSHALL LEGAL SOCIETY AND
BLACK PRE-LAW ASSOCIATION,
Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF OF RESPONDENTS HOPWOOD AND CARVELL IN OPPOSITION TO CERTIORARI

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Respondents labor mightily but, we believe, ultimately unsuccessfully, to cloud the issues arising from the approach taken by the court of appeals to the question of intervention by African-American students in this "reverse discrimination" case. Only a few points require reply.

1. ***Jurisdiction of this Court.*** Respondents confuse the issue of this Court's *jurisdiction* to review a judgment with the scope of the questions it may consider once it has determined to grant review. The argument that the Court lacks jurisdiction to review the court of appeals' 1994 ruling affirming the district court's first denial of intervention, because no

petition seeking review was filed within ninety days (as required by 28 U.S.C. § 2101(c)), is beside the point. As explicitly stated at p. 1 of the Petition, the Thurgood Marshall Legal Society and the Black Pre-Law Association have requested that this Court review only the March 18, 1996 judgment of the court of appeals. Their Petition was unquestionably timely filed for this purpose.

To be sure, Petitioners seek review so that this Court may clarify the law and correct the errors which led the court below to enter that erroneous judgment. These include the grossly inappropriate refusal by the court of appeals -- ostensibly applying the "law of the case" doctrine to an earlier decision rendered under different factual circumstances[1] -- to

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[1]We agree with Respondents that we "'made clear [our] intention to raise questions about the discriminatory effect of the use of the Texas Index as an admissions sorting device'" in briefing the first appeal (Br. Opp. at 17, quoting Pet. at 26). The panel on the first appeal did not hold, explicitly or implicitly, that intervention could not be justified for the purpose of assuring that this evidence was presented. Rather, its decision implied precisely the opposite -- because the panel affirmed the trial judge's denial of intervention based upon its assumption that intervention was unnecessary to assure that the evidence would be introduced:

> Although the BPLA and TMLS may have ready access to more evidence than the State, we see no reason they cannot provide this evidence to the

reach the merits of Petitioners' appeal from the district court's denial of their second request to intervene in the action.[2]

> State. The BPLA and the TMLS have been authorized to act as *amicus* and we see no indication that the State would not welcome their assistance. BPLA and TMLS have not met their burden of demonstrating that they have a separate interest that the State will not adequately represent. The proposed intervenors have not demonstrated that the State will not strongly defend its affirmative action program. Nor have the proposed intervenors shown that they have a separate defense of the affirmative action plan that the State has failed to assert. *See, Jansen v. Cincinnati*, 904 F.2d 336 (6th Cir. 1990).

(App. 98a-99a.) Following this action by the first panel, the State refused to present the evidence questioning the validity of the Texas Index as an admissions criterion. The propriety of denying intervention under these circumstances -- diametrically opposite those anticipated by the first panel -- therefore had never been ruled upon by the first panel and the second panel's refusal to consider the issue on the ground of "law of the case" was patently in error.

[2]Petitioners believe that the application of the "law of the case" doctrine by the court below "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S. Ct. R. 10.1(a).

But the approach of the panel below also reflected the established and incorrect Fifth Circuit standard for determining whether proposed intervenors' interests will be adequately represented by existing parties. The court of appeals' holding that Texas' refusal to introduce the evidence proffered by Petitioners did not amount to sufficient "changed circumstances" justifying intervention flowed directly from its adherence to the requirement that proposed intervenors must demonstrate "that the present parties *will* inadequately represent the proposed intervenors' interests" (App. 72a n.59 [emphasis added]). That standard, of course, is inconsistent with the principles announced in *Trbovich*[3] and followed by many other Circuits. The fact that the decision in Petitioners' appeal from the first denial of intervention rested principally upon this same incorrect legal standard hardly insulates it from correction by this Court in these proceedings.

Considering and correcting that legal error in the course of reviewing the 1996 judgment of the court of appeals will not involve retrospective reopening and reversal or modification of the earlier 1994 judgment, even assuming *arguendo* that it was a "final" order requiring immediate appeal.[4] Hence,

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[3]*Trbovich v. United Mine Workers*, 404 U.S. 528 (1972).

[4]*See* Br. Opp. at 14-16, noting unsettled state of the law on this question. This Court need not resolve the question in order to decide this case.

there is no jurisdictional impediment preventing this Court's review of the intervention question decided below.

2. ***Conflict among the Circuits.*** Respondents assert that we have manufactured a conflict among the Courts of Appeals about the standard to be applied in judging adequacy of representation where intervention is sought on the same side of an action on which a governmental agency is a party. They imply, for example, that the Ninth Circuit now follows the more stringent *parens patriae* presumption of adequacy, citing *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir. 1995). The distinction between the approach of the Ninth Circuit panel and that of the court below could not be greater, however.

The Ninth Circuit court begins its consideration of adequacy of representation by recognizing that a proposed intervenor's "burden in showing inadequate representation is minimal: it is sufficient to show that representation *may* be inadequate. *Trbovich v. United Mine Workers* [citation omitted]." 66 F.3d at 1498. While the court goes on to recognize that "'a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee,'" [citations omitted], it holds that the presumption is no more difficult to overcome than it would be to meet the general rule of *Trbovich*.

In the Ninth Circuit's view, a demonstration that the interests of the proposed intervenors are not identical with the general public interest that the governmental agency must uphold suffices to "satisf[y] the minimal showing required that the Forest Service *may* not adequately represent their interests in defending against the issuance of a broad injunction," 66 F.3d at 1499 [emphasis supplied]. The trial court's denial of intervention was reversed because "[t]he Forest Service is required to represent a broader view than the more narrow, parochial interests of the State of Arizona and Apache County." *Id. Accord*, *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993)("the intervenors sought to advance their own interests in achieving the greatest possible participation in the political process. Dade County, on the other hand, was required to balance a range of interests likely to diverge from those of the intervenors. . . . These divergent interests created a risk that Dade County might not adequately represent the applicants").[5]

Thus, there is a real and significant difference in approach among the Courts of Appeals on the standard for intervention that warrants this Court's review.

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[5]We apologize to the Court for the typographical error at p. 19 of the Petition, at which this case was cited. The pinpoint citation should have read "1477-78" rather than "n.77-78."

3. ***The relevance of petitioners' evidence about the Texas Index.*** Respondents attempt to minimize the significance of the evidence about the Texas Index's invalidity by characterizing it as "quixotic" (Br. Opp., at 19 n.10) and citing three cases for the proposition that "the use of an invalid test *does not* justify subsequent race-conscious decision-making to 'remedy' the use of the invalid test." *Id.* [emphasis in original]. However, each of the decisions cited by Respondents recognized that following a demonstration that a test or other selection process was invalid and had a discriminatory effect, race-conscious relief is proper until valid, nondiscriminatory procedures can be implemented. Each of the cited decisions condemned as not "narrowly tailored" the continued, long-term use of race-conscious measures by public agencies that exhibited no interest in developing and validating new selection criteria.

See Aiken v. City of Memphis, 37 F.3d 1155, 1164 (6th Cir. 1994) (*en banc*) ("over 15 years ago the City stipulated that it is 'currently in the process of developing' such procedures, and that 'development of fully validated processes is two to three years from accomplishment' . . . Yet, incredibly, the City continues to make police and fire department promotions according to procedures that have not been validated as racially neutral. This dereliction cuts against a finding that the race-based remedies at issue here are narrowly tailored"); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994) ("The goal of eliminating discrimination may

justify some interim use of affirmative action, but affirmative action selection provisions are themselves a form of discrimination that cannot continue forever. An end to racial discrimination demands the development of valid, non-discriminatory selection procedures to replace race-conscious selection procedures. . . . [T]he single most important race-neutral alternative contained in the decrees was the requirement that the Board develop and put in place non-discriminatory selection procedures--a requirement that the Board has not satisfied"); *Billish v. City of Chicago*, 989 F.2d 890, 894-95 (7th Cir.) (*en banc*) ("Of course if the city had a desperate need for twenty captains just then, and the only eligibility list it had was based on a quite possibly biased examination that had been given in 1979, a modest departure in favor of remedial racial balance might well be justified. . . . But the record does not reveal whether the city had an urgent need for twenty captains and thus could not await the administering and scoring of an unbiased exam"), *cert. denied*, 114 S. Ct. 290 (1993).

Thus, far from being "quixotic," Petitioners' evidence, if it had been presented to the trial court, would have justified race-conscious relief until truly nondiscriminatory admissions criteria could be developed by the University of Texas Law School.

4. ***Reversal of the judgment below will not require this Court to decide issues other than those raised in the Petition.*** In a final attempt to complicate this matter, Respondents assert that if this Court grants review,

it will be required "to resolve numerous fact-specific questions not passed upon by the lower courts" (Br. Opp., at 20). None of those questions was answered by the court of appeals, and the answer to none of those questions was articulated by the panel as the basis for its judgment. This Court therefore need not deal with any of those questions in order to correct the legal errors by the court below that *did* undergird its judgment.

Conclusion

For the reasons stated herein, as well as those given in the Petition, the Writ of Certiorari should be issued.

Respectfully submitted,

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